Supreme Court, U.S.
FILED
DEC 11 2003

No. 03-870

IN THE

Supreme Court of the United States

SUSAN VICORY, *et al.*,

Petitioners,

v.

VERMILLION COUNTY, INDIANA and BOARD OF COMMISSIONERS OF VERMILLION COUNTY, INDIANA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

PETITION FOR A WRIT OF CERTIORARI

STEPHEN L. WILLIAMS
Counsel of Record
JOHN T. ROACH
MANN LAW FIRM
646 Walnut Street
Terre Haute, IN 47807
(812) 232-0107

C. JOSEPH ANDERSON
JOHN NICHOLS
ANDERSON & NICHOLS
300 Ohio Street
Terre Haute, IN 47807
(812) 234-7777

ERIC A. FREY
FREY LAW FIRM
618 Wabash Avenue, Suite 200
Terre Haute, IN 47808
(812) 238-1811

Attorneys for Petitioners

184556

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

87 pp

QUESTIONS PRESENTED FOR REVIEW

The Civil Rights Act provides that every person acting under color of State law, who deprives any citizen of rights, privileges or immunities protected by the Constitution and laws shall be liable to the injured party. 42 U.S.C. § 1983.

The Court of Appeals of Indiana held, however, that a County and its Board of Commissioners had no duty under 42 U.S.C. § 1983 to protect patients in a County owned hospital from an employee who was murdering patients at epidemic levels at the hospital over a period of two years, because the State does not owe a duty to protect an individual against private violence. The Court of Appeals also held that the County was not liable for the County Health Officer's failure to investigate the suspiciously high number of recurring deaths at the County owned hospital, and that the County had no direct duty to investigate and prevent the deaths occurring at the hospital. The Court concluded that the petitioners failed to assert a deprivation of constitutional rights necessary to maintain a claim under § 1983. Indiana's highest court, the Supreme Court of Indiana, denied transfer of the case, thus declining to review the decision of the Court of Appeals. Thus, the questions for review are:

1. Whether or not a County, and its Board of Commissioners, have any duty under 42 U.S.C. § 1983, as stated by this Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), to protect patients in a County owned hospital from an employee of the hospital who, for a period of two years, is murdering patients at the hospital at epidemic levels?

2. Whether or not a County, and its Board of Commissioners, have any duty under § 1983, as stated by this Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), and the federal courts of appeals, to protect patients at a County owned hospital under circumstances under which the County created a dangerous situation in the hospital or rendered its patients more vulnerable to danger?

3. Whether or not a County is liable under § 1983, as stated by this Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) and *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), and by federal courts of appeals, for its County Health Officer's failure to investigate suspiciously high numbers of recurring deaths occurring for a period of two years at the County Hospital, when the County Health Officer is a policymaker on matters of public health for the County?

4. Whether or not a County is liable under § 1983 for failure to perform its statutory duties under § 1983, as stated by this Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) and *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), to investigate, report, and prevent recurring suspicious deaths occurring at a County owned hospital at epidemic levels over a period of two years?

5. Whether or not petitioners have asserted a deprivation of constitutional rights necessary to maintain a claim under 42 U.S.C. § 1983 by demonstrating a deliberate indifference by the County, the Board of Commissioners, and the County Health Officer to the health needs and the lives of the patients at the County owned Vermillion County Hospital?

PARTIES TO THE PROCEEDING

There are no nongovernmental corporations involved in this case, which precludes the need for a corporate disclosure statement pursuant to Rule 29.6.

The following are petitioners in this proceeding, who are the eighty personal representatives of the estates of the seventy-six decedents in this case:

Susan Vicory
Veneta Benton
John Landsaw
Pearl Johnson
James Bratcher
Armand Gottardi
Claudia Haughee
Jack Barclay
Katherine Ahl
Helen Vastine
Junior Pressley, Jr.
Orville Hornbeck
Timothy L. Areson
Lawana Kraemer
Bill Pearman
Hazel Hale
John Rozsa
John Doran
Wayne Walton
Kathy Mason
Bryce Johnson
Russell Firestone, Jr.
Corletta Beard
Loretta Blackburn
Larry Roberts
Mildred Cook
John Richardson
David Wheeler
Hilda Simpson
Homer M. Garrigus
Penny Frink
Lela Natale
Mary Snyder
Rita Miller
Cheryl Lear
Marlene Stevenson
Richard C. Marshall, Jr.
Charles Catterson
Mildred Smith
Jerry Sims
Brenda L. Henderson
Orletta Welker
Phillip Pickett
Nellie Norman
Norman Miller
Robin Berg
Tom Alderson
Elizabeth L. Hiddle
Marilyn Whittington
Mary Hedden
Peggy Falls
Gloria McGill
Lorie Hickman
Evelyn M. Hobert

Norma Mae Siddens
Anthony R. Walters
Derek H. Maxwell, II
Kathryn M. Bricker
E. Neil Merritt
Roger Griffin
James Huxford
Mildred Genisio
Michael E. Gilman
Clinton S. Webb
Tanya Cottrell
Rebecca Battson
Robert Meadows
James A. Stillwell
Dom Rolando
Scott White
Sue Mershon
Lance Pefley
John Lee
James Lee
Rodney Myers
Marilyn J. Wolfe
Viola K. Chrimes
Bruce Hafner
Ethel F. Richardson
Malcolm Aukerman

The following are respondents in this case:

Vermillion County, Indiana
Board of Commissioners of Vermillion County, Indiana

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of Indiana in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of Indiana (per Baker, J., with Sullivan and Darden, JJ, concurring) affirming in part, reversing in part, and remanding for entry of summary judgment in favor of the respondents on all of petitioners' federal and state law claims is unpublished, other than the disposition table published at 790 N.E.2d 180 (Table) (Ind. App. 2003), and is reproduced in the Appendices (Pet. App.) hereto. Pet. App. 1a-25a. The Indiana Supreme Court's order denying transfer of jurisdiction (per Shepard, C.J.) is not published and is also reproduced in the Appendices. Pet. App. 39a-40a. The trial court's order (per Nardi, J.) denying respondents' second motion for summary judgment in part and granting in part, is unpublished and is reproduced in the Appendices. Pet. App. 29a-38a. The trial court's order (per Nardi, J.) denying respondents' first motion for summary judgment in part and granting in part, is unpublished and is reproduced in the Appendices. Pet. App. 26a-28a.

STATEMENT OF JURISDICTION

The Court of Appeals of Indiana entered its opinion on June 3, 2003. The Indiana Supreme Court denied transfer of jurisdiction on September 26, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

The statutory provision relevant to this petition is 42 U.S.C. § 1983, which states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Facts

This case arises as a result of over one hundred hospital patient deaths, characterized at epidemic death levels, which occurred over a period of approximately two years at a county owned hospital. The patient deaths resulted from murders committed by a nurse employee at the hospital, Nurse Orville

Lynn Majors. There is no comparable occurrence of epidemic hospital deaths in American history.[1]

Because of the rise in the mortality rate at the hospital during Majors' employment, a criminal investigation by the Indiana State Police began in March of 1995. The police completed their investigation in December of 1997, and filed charges against Majors. The investigation of the epidemic level mortality rate at the hospital's intensive care unit ultimately ended in Majors' conviction for murder. *Ling v. Stillwell*, 732 N.E.2d 1270, 1273 (Ind. App. 2000), *trans. denied*, 753 N.E.2d 3 (Ind. 2003) Majors was convicted of murdering six of the hospital patients, and is currently serving a 360 year prison sentence. In the criminal cases which resulted in the six convictions for murders, the investigators concluded that Majors killed these patients by injecting them with potassium chloride. *Majors v. State*, 773 N.E.2d 231, 234 (Ind. 2002)

Vermillion County Hospital (VCH) was a 62 bed facility in Clinton, Indiana, with an intensive care unit (ICU).[2] On February 1, 1993, VCH rehired a licensed practical nurse, Orville Lynn Majors, who worked in the ICU. VCH had previously terminated Majors on May 23, 1991, with a recommendation not to rehire him. Majors worked at VCH until March 31, 1995.

---

1. *See, e.g., The Washington Times*, Nurses, Multiple Killings Linked in Troubling Trend, December 7, 1998.

2. The exact location in the record below of the evidence supporting the facts in this portion of this Petition is shown in the Appendix at 41a-45a, which was Petitioners' Statement of Facts to both the Court of Appeals of Indiana and the Supreme Court of Indiana.

The death rate in the ICU at Vermillion County Hospital in the pre-Majors years of 1990, 1991 and 1992, was 29, 25, and 26, respectively. However, after Majors was rehired, the death rate increased to 101 for calendar year 1994. At the time the death rate increased to epidemic levels, the number of patients being admitted to the ICU was decreasing in comparison to prior years.

During the time period of May 1, 1993 to December 31, 1994, inpatient deaths at the hospital nearly doubled, and ICU deaths nearly quadrupled. The State survey shows that total deaths at the hospital were as follows: 1990-90; 1991-83; 1992-91; 1993-87; 1994-160.

After investigations began by the Indiana State Police, and the Indiana State Board of Health, a team investigating the deaths at VCH commissioned an independent epidemiology study, which was conducted by Dr. Steven Lamm, and called the Lamm study. Dr. Lamm concluded that the death rate increased so dramatically that it constituted an epidemic by July of 1994. Lamm's Study also indicated that during the epidemic period the deaths were almost all during shifts when Majors worked.

The Medical Services Committee of the county hospital was supposed to review the death charts. The County Health Officer, Dr. John Albrecht, also a member of the Medical Services Committee, was typically the only physician who attended the Service of Medicine Committee meetings. The County Health Officer necessarily had the same facts that Dr. Lamm later reviewed, showing that there was a mortality epidemic at Vermillion County Hospital.

In a survey of VCH conducted by the Indiana State Board of Health on April 5, 1995[3], the Indiana State Department of Health survey team found that the Service of Medicine Committee, of which County Health Officer Dr. Albrecht was the Chairman, was composed of three physicians, who never reviewed patient charts at all. Rather, they directed the nursing supervisor to review the death charts, and then present her findings to the Committee.

The County Health Officer, Dr. John Albrecht, was intimately involved in the day to day operations of Vermillion County Hospital. He leased office space from the hospital for about ten years after first coming to Clinton. He has been on the hospital staff the entire time he had been Vermillion County Health Officer; staff since 1984, Vermillion County Health Officer since 1988. He had served as Chief of the Medical Staff and had chaired the Medical Executive Committee, the Service of Medicine Committee, and the Pharmacy and Therapeutics Committee, and had been on the Utilization Review Committee and Records Committee. No one ever told him to forget as County Health Officer what he learned on any of the committees. His role as County Health Officer included giving attention to any epidemic death rate due to communicable disease.

B. Proceedings Below

Petitioners are the surviving next of kin or the duly appointed and acting personal representatives of patients who died under suspicious circumstances in the Vermillion County Hospital, who were under the care of nurse Orville Lynn Majors. Petitioners filed the lawsuit against Vermillion

3. The survey revealed information pertaining to the death rate at the hospital, as well as questionable practices with respect to death charts of individuals. *Ling v. Stillwell*, 732 N.E.2d 1270, 1273 (Ind. App. 2000), *trans. denied*, 753 N.E.2d 3 (Ind. 2003)

County, Indiana, the Board of Commissioners of Vermillion County, Indiana, Vermillion County Hospital, the Board of Trustees of Vermillion County Hospital, former administrator John Ling, Jr., nurse Orville Lynn Majors, and Dr. John Albrecht, individually and in his capacity as Vermillion County Health Officer. Petitioners' complaints were filed in the Vermillion Circuit Court, and were amended numerous times to add additional plaintiffs.

Plaintiffs' complaints were based upon violations of civil rights, negligence, and gross negligence. Petitioners first alleged an action under 42 U.S.C. § 1983 in their Second Amended Complaint, filed in the Vermillion Circuit Court on April 9, 1996. Petitioners alleged that respondents were acting under color of state law, and denied the patients' rights under state and federal law and the Constitutions of Indiana and the United States, including the rights to life and liberty. Petitioners also alleged that the court has jurisdiction under 42 U.S.C. § 1983, 28 U.S.C. § 1331, 28 U.S.C. § 1343, and the Fifth and Fourteenth Amendments to the United States Constitution. Petitioners alleged that respondents "engaged in conduct which demonstrates deliberate indifference by failing to provide adequate protection to the plaintiffs and their decedents and, as state actors, the defendants were recklessly indifferent, grossly negligent or deliberately or intentionally indifferent." (Second Amended Complaint, Count I, paragraph 12) Additionally, Petitioners alleged that "[t]he defendants were consciously indifferent to the risks that the plaintiffs' decedents would be killed or would die in the hospital and are therefor (*sic*) liable under Federal law for a violation of the civil rights of the plaintiffs." (Second Amended Complaint, Count I, paragraph 14) Petitioners further alleged that

> [a]s a direct and proximate result of the above conduct by the defendants, the plaintiffs and all those similarly situated were injured and damaged

> and their rights to equal protection of the laws, their rights to due process of law their life and liberty and their property rights were violated, injured and damaged.

(Second Amended Complaint, Count I, paragraph 15).

These civil rights violations were alleged in all subsequent amended complaints. In the Ninth Amended Complaint, Petitioners alleged that the Vermillion County Health Officer, Dr. John Albrecht,

> was a county official engaged in making policies for Vermillion County Indiana and the remaining Defendants were acting under color of law in the operation of a county-owned hospital which was established and operated pursuant to Indiana law. . . . The actions of the Defendants constituted willful, intentional, deliberate and conscious indifference to and disregard of the constitutional rights of the plaintiffs' decedents and their surviving next of kin, in that they deprived them of their lives and the right to associate with their families.

(Ninth Amended Complaint, Count III, paragraph 2) "The above actions by the defendants constitute a violation of 42 U.S.C. § 1983. . . ." (Ninth Amended Complaint, Count III, paragraph 3) These allegations were also included in the Tenth Amended Complaint.

On March 23, 2000, the trial court denied the first Motion for Summary Judgment Filed by Defendant Vermillion County and the Commissioners of Vermillion County, in all regards, including the § 1983 issues, except on the issue of punitive damages, which was granted. Pet. App. 26a-28a.

On September 22, 2000, Vermillion County, Indiana, and the Commissioners of Vermillion County, Indiana, filed their Second Motion for Summary Judgment and Memorandum in Support of Second Motion for Summary Judgment. Once again, the issue of liability under 42 U.S.C. § 1983 was raised.

C. Disposition by the Courts Below

As shown above, the Court denied Defendants' first Motion for Summary Judgment as to the § 1983 issues on March 23, 2000. Pet. App. 26a-28a.

On January 9, 2002, the trial court denied Vermillion County's Second Motion for Summary Judgment. Relevant to the issues before us, the Court held:

> 11. In summary, the Court's original conclusions in regard to the matter of summary judgment on the plaintiffs' Section 1983 claims remain the same. The Court agrees that *Monell v. Dept. of Social Services* 436 U.S. 658, 98 S. Ct. 2018 (1978) stands for the proposition that the county cannot be held liable for the acts of a lower-level employee on a theory of respondeat superior. However, the county can be liable for conduct officially sanctioned by municipal actors or policy-makers through direct action or custom. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292 (1986). Thus the actions of the county executive and the county health officer in causing the damages claimed by the plaintiffs present genuine issues in this case.
>
> 12. For all of these reasons, the Court again finds that genuine issues fact exist in regard to the claims made by the plaintiffs under 42 U.S.C.

> Section 1983 and that the county defendants are not entitled to judgment as a matter of law. The Court denies the Second Motion for Summary Judgment in regard to the plaintiffs' claims under 42 U.S.C. § 1983.
>
> * * * *
>
> For all of these reasons, the Court now reaffirms those portions of its Order of March 23, 2000, which are not inconsistent with this Order.

Pet. App. 33a, 34a, 37a.

Thus, the Court again denied the second summary judgment motion as to the § 1983 issues.

Vermillion County, Indiana, and the Commissioners of Vermillion County, Indiana, appealed the ruling of the trial court to the Court of Appeals of Indiana.

On June 3, 2003, the Court of Appeals of Indiana, (Baker, J.) issued its written Memorandum Decision-Not for Publication. Pet. App. 1a-25a. The Court of Appeals affirmed in part, reversed in part, and remanded the judgment of the trial court for entry of summary judgment in favor of Vermillion County, Indiana, and the Commissioners of Vermillion County Indiana on all of petitioners' state and federal law claims.

The Court of Appeals held that the County defendants were entitled to summary judgment on the § 1983 claims, in that the State does not have a duty to protect an individual from private violence. Pet. App. 4a-9a. The Court also held that the County defendants are not liable for the County Health Officer's failure to investigate the suspiciously high number of deaths at Vermillion County Hospital. Pet. App. 19a-22a. Additionally, the Court held that the County

defendants had no direct duty to investigate and prevent the deaths occurring at Vermillion County Hospital, by concluding, as a matter of law, that the governing board, not the County Defendants, were responsible for the general operation and control of the hospital. Pet. App. 22a-23a. The Court concluded that petitioners failed to assert a deprivation of constitutional rights necessary to maintain a § 1983 claim. Pet. App. 24a.

On June 23, 2003, the petitioners filed their Petition to Transfer of Appellees with the Indiana Supreme Court, on the basis that the decision of the Indiana Court of Appeals was in conflict with decisions of the United States Supreme Court and the United States Courts of Appeal regarding the § 1983 issues.

On September 26, 2003, the Indiana Supreme Court (Shepard, C.J.) denied petitioners' petition to transfer jurisdiction, thus declining to review the decision of the Court of Appeals of Indiana. Pet. App. 39a-40a.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

The Petition should be granted, both because the Court of Appeals of Indiana has decided an important federal question in a way that conflicts with decisions of the United States Supreme Court, and with decisions of the United States Courts of Appeals.

I. The Court Of Appeals of Indiana Has Decided An Important Federal Question In A Way That Conflicts With Relevant Decisions of the United States Supreme Court.

A. The *DeShaney* Rule Regarding Acts Of Private Violence Is Inapplicable To The Present Case

The trial court correctly concluded that the "issue in this case is the alleged failure of the county defendants to comply with Indiana law and administrative rules and regulations and not with the enforcement of law against third parties," Pet. App. 35a, ¶ 16, which correctly framed the issues, and was the correct ruling under *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). However, without authority, the Court of Appeals of Indiana negated the statutory duties of the County defendants cited by the trial court by holding that the victims in this case allege only a failure to protect private individuals against private violence.

The Court of Appeals of Indiana did not apply *Pembaur*, but incorrectly premised its holding on *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), and related opinions "that a State's failure to protect an individual against *private* violence simply does not constitute a violation of the Due Process Clause." Pet. App. 7a (emphasis supplied). In the instant case, an employee of the County owned hospital murdered patients in the hospital,

and the murders recurred, because the County defendants did not perform their statutory duties, even when the Vermillion County Health Officer and the hospital staff were aware of the epidemic increase in deaths.

Decisions cited by the Court of Appeals involve singular acts of violence in a private setting. In stark contrast, in the instant case, a government official[4] ignored a course of conduct spanning approximately two years, in a public setting, in a County Hospital, resulting in over one hundred deaths, at an epidemic level. *DeShaney*, *supra*, is factually distinguishable from the instant case in that *DeShaney* involved a private citizen being victimized by another private citizen. The result of the decision of the Court of Appeals of Indiana is to allow governmental officials to ignore or refuse to comply with their statutory duties to protect the citizens of the State, and the public health, under even the gravest of circumstances, under the guise that they have no duty to protect private citizens from one another.

DeShaney is also inapplicable to the instant case in that the child was returned to his father and faced the same dangers that he had faced previously. As stated by the Sixth Circuit in *Cartwright v. City of Marine City*, 336 F.3d 487 (6th Cir. 2003): "The question is not whether the victim was safer *during* the state action, but whether he was safer *before* the state action than he was *after* it." In the instant case, the patients, by being admitted to the Vermillion County

4. The statutory duties of the County Health Officer included taking all necessary actions to protect the public health, Ind. Code § 16-20-1-23(a) (2003), to abate wrongful health conditions within his jurisdiction, I.C. § 16-20-1-25(a) (2003), to collect, record, and report all deaths within the county to the state department of health, I.C. § 16-20-1-17(2003), to "enforce the health laws, ordinances, orders, rules and regulations. . . ." I.C. § 16-20-1-19 (2003), and by virtue of his position on the Service of Medicine Committee at the county hospital, to *review* the death charts and records.

Hospital, were *placed* in danger in a county owned hospital where murders of patients were occurring, not being returned to a pre-existing danger in a private setting.

The Court of Appeals should have applied *Pembaur*, not *DeShaney*.

B. Liability May Be Imposed For A Single Decision By Governmental Policymakers

The Court of Appeals of Indiana again failed to follow the pertinent line of cases decided by the United States Supreme Court, including *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). *Pembaur* held that liability may be imposed for even a single decision by governmental policymakers, under appropriate circumstances, that is, if the decision to adopt a particular course of action is directed by those who establish governmental policy. *Id.* at 477-81.

In *Pembaur*, the County Prosecutor was acting as the final decision maker for the County in the critical area of inquiry, and was liable under § 1983. *Id.* at 483-85. In the present case, the Vermillion County Health Officer[5] was acting as the final decision maker for the County for matters of public health, and chose to ignore the epidemic increase in the death rate at the County owned hospital.

The Court of Appeals of Indiana cited and quoted *DeShaney*, *supra*, for the proposition that a State's failure to

5. The County Health Officer had the statutory duty to take all necessary actions to protect the public health, I.C. § 16-20-1-23(a) (2003), to abate wrongful health conditions within his jurisdiction, I.C. § 16-20-1-25(a) (2003), to collect, record, and report all deaths within the county to the state department of health, I.C. § 16-20-1-17 (2003), and by virtue of his position on the Service of Medicine Committee at the county hospital, to *review* the death charts and records.

protect an individual against private violence doesn't constitute a violation of the due process clause. However, *Pembaur*, *supra*, holds that liability may be imposed for decisions by governmental policymakers if the decision to adopt a course of conduct is directed by those who establish governmental policy. *Pembaur*, *supra*, 475 U.S. 469, 477-81 (1986). Here, the County Health Officer had the statutory duty to "abate wrongful health conditions within his jurisdiction,"[6] to take all necessary action to protect the public health,[7] to enforce the health laws and regulations[8], and, by virtue of his position on the Service of Medicine Committee, to review the death charts and records. Thus, the trial court below correctly concluded that the actions of the Commissioners, as county executive[9], and the County Health Officer, made them the policymakers and decision makers for the County for these critical public health care issues. Pet. App. 32a-33a, ¶¶ 8-12. The Court of Appeals should have applied *Pembaur*, not *DeShaney*.

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6. I.C. § 16-20-1-25(a) (2003).

7. I.C. § 16-20-1-23(a) (2003).

8. I.C. § 16-20-1-19 (2003).

9. The Commissioners are the county executive of Vermillion County. Ind. Code § 8-22-1-7 (2003). The health department is mandated to operate as *an agency of local government*, and is administratively responsible to the appropriate county or city executive. Ind. Code § 16-20-1-2 (2003) (emphasis added). "The health officer is the *executive officer* of the local health department and shall serve as secretary of the local board of health." Ind. Code § 16-20-2-16(d) (2003) (emphasis added).

C. A County Can Be Liable Where It Causes The Constitutional Deprivation At Issue

The decision of the Court of Appeals is also contrary to the United States Supreme Court decisions such as *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). In *Monell*, the United States Supreme Court held that a county can be liable under § 1983 where it causes the constitutional deprivation at issue. It is where the execution of the governmental policy or custom inflicts a constitutional injury that the municipality or county can be held liable. It is clear that the Court intended municipal liability to attach where official municipal policy of some type causes the infliction of an injury of constitutional significance.

The requirement that the deprivation be due to "official policy" was intended to distinguish acts of the municipality from acts of low-level employees. This was designed to make it clear that only where the action is fairly construed to be the official act of the municipality or its policy-makers should liability attach.

Thus, recovery under § 1983 is limited to situations where municipal actors or policy-makers have officially sanctioned the conduct. *See Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). The official acts of a municipality include those of officials whose acts or edicts may fairly be said to represent official policy. When the execution of that policy or custom results in deprivation of citizens' rights and privileges, the municipality is liable under § 1983. *See also Tapia v. City of Greenwood*, 965 F.2d 336, 338 (7th Cir. 1992); *Patrick v. Jasper County*, 901 F.2d 561, 565 (7th Cir. 1990).

The Indiana legislative scheme, as set forth below, clearly demonstrates that the County Health Officer, county commissioners, the hospital governing board, and the

administrator were the persons who were responsible for the establishment of policies and procedures to provide for quality assurance. The defendants are the ultimate policy-makers under *Monell* on the issue of operating procedures in the hospital. It was their ultimate responsibility to establish bylaws and policies to ensure that review of patient records for morbidity and mortality would take place in the instant case. As the Indiana State Board of Health concluded, no meaningful review of patient records took place, resulting in the continuing deaths of over one hundred patients over a two year period.

The Commissioners are the county executive of Vermillion County. Ind. Code § 8-22-1-7 (2003). The health department is mandated to operate as *an agency of local government*, and is administratively responsible to the appropriate county or city executive. Ind. Code § 16-20-1-2 (2003) (emphasis added). "The health officer is the *executive officer* of the local health department and shall serve as secretary of the local board of health." Ind. Code § 16-20-2-16(d) (2003) (emphasis added).

The duties of the County Health Officer are also established by statutory mandate.[10] The County Health Officer *has the duty to collect, record and report the vital statistics for the county, including all deaths, and is responsible for forwarding the records to the state department of health.* Ind. Code § 16-20-1-17 (2003) (emphasis added).[11] The County Health Officer is authorized to inspect property and *take all necessary action to protect the public health.* Ind. Code § 16-20-1-23(a) (2003) (emphasis added).

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10. Moreover, under Indiana law, statutes governing the health officer apply generally to promote public health and welfare. *Steele v. Campbell*, 118 Ind. App. 549, 82 N.E.2d 274, 275 (1948).

11. In addition, the County Health Officer is directed to "enforce the health laws, ordinances, orders, rules and regulations. . . ." Ind. Code § 16-20-1-19 (2003).

The County Health Officer also has a clear duty to abate an unlawful condition within his jurisdiction and may seek legal enforcement of these powers. Ind. Code § 16-20-1-25(a) (2003) states that "[a] person shall not institute, permit, or maintain any conditions that may transmit, generate, or promote disease." The statute concludes with the following words: "If the action concerning public health is a criminal offense, a law enforcement authority with jurisdiction over the place where the offense occurred shall be notified." Ind. Code § 16-20-1-25(c) (2003). This statute applies, not only to the spread of disease, but also to matters concerning public health that are criminal offenses. Obviously, the statutory duties of prevention and abatement of the County Health Officer would apply to multiple recurring homicides at an epidemic level at a county owned hospital, such as in the instant case.

County hospitals, such as Vermillion County Hospital, are created by statute, which also provide for procedures and policies to be followed by the County and its delegated representatives in carrying out such matters. County hospitals must be established by the County Executive, Ind. Code § 16-22-2-1 (2003), that is, as shown above, the County Commissioners. I.C. § 8-22-1-7.

The medical staff of the hospital is responsible to the governing board for the clinical and scientific work of the hospital. The board is to receive advice from the medical staff regarding professional matters, and policies, and for review of professional practices in the hospital *for the purpose of reducing morbidity and mortality* and for the improvement of the care of patients in the hospital, including the quality and necessity of care provided and the *preventability of complications and deaths in the hospital. See* Ind. Code § 16-21-2-7 (2003) (emphasis added).[12]

12. Again, the County Health Officer was directed by statute to enforce these health laws. I.C. § 16-20-1-19 (2003).

These statutory duties, for which the County Commissioners are ultimately responsible, are further described in the Indiana Administrative Code, which establishes numerous dictates regarding the operation of county hospitals. Ind. Code § 16-21-1 (2003) *et seq.* provides legislative authority and basis for the promulgation of a number of operational regulatory requirements. Ind. Admin. Code tit. 410, r. 15-1.2-1(d) (2003) *requires the reporting of unusual occurrences in the hospital.* Further, the hospital is required by Section 1(d) to have a plan to address the internal review and *reporting of unusual occurrences.*[13]

In addition, the provisions of Ind. Admin. Code tit. 410, r. 15-1.4-1 (2003) require the governing board (and thus the County Commissioners) to be responsible for the medical staff. The board must "ensure that the medical staff is accountable and responsible to the governing board for the quality of care provided to patients." 410 IAC 15-1.4-1(b)(4)

Finally, Dr. Albrecht was authorized, and obligated, as Vermillion County Health Officer, to review the deaths at Vermillion County Hospital by using the information obtained from the death certificates.

Thus, the trial court correctly applied *Monell*, and concluded that the County Commissioners, as the county executive, as well as the County Health Officer, were governmental actors or policymakers for the Vermillion County Hospital on these critical public health matters. Pet. App. 33a, ¶ 11. The Court of Appeals of Indiana should have applied *Monell.*

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13. Once again, the County Health Officer is directed by statute to enforce these health regulations. I.C. § 16-20-1-19 (2003).

II. The Court Of Appeals Of Indiana Has Decided An Important Federal Question In A Way That Conflicts With Decisions Of The United States Courts Of Appeal.

A. Even If The *DeShaney* Rule Were Applicable, The Exception Would Apply Because The Respondents Created A Dangerous Situation And Caused The Patients To Be More Vulnerable to Danger

A case decided in the Third Circuit conflicts with the decision of the Court of Appeals of Indiana, and supports petitioners' position that *DeShaney* is inapplicable to the facts of this case. In *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir. 1989), *reh'g denied*, *cert. denied*, 493 U.S. 1044 (1990), a student brought a civil rights action against the school district, the principal, assistant principal, and the superintendent after an alleged sexual assault by a teacher. The Appellate Court's discussion and distinguishing of *DeShaney* as it pertains to private third parties is applicable and strikingly similar to the instant case. The Court explained:

> Unlike DeShaney's father, who was referred to throughout the *DeShaney* opinion as a private third party, *Wright was a school district employee*[14] *subject to defendants' immediate control*. In fact, many of Wright's interactions with Stoneking occurred in the course of his performance of his official responsibilities, such as during school-sponsored events and trips, and sometimes on school property.

Id. at 724.

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14. Likewise, in the instant case, Nurse Orville Lynn Majors was an employee of a county hospital. The County Health Officer, Dr. John Albrecht, was an employee of the County.

Thus, the fact situation in *Stoneking* is analogous to the instant case. Nurse Orville Lynn Majors, unlike DeShaney's father, was not a private third party. Majors was an employee of the county owned hospital, subject to the ultimate control of the County and the County Commissioners. The County Health Officer was not a private party. As in *Stoneking*, Majors' actions occurred in the course of his performance as an employee of Vermillion County Hospital, and Albrecht, as an employee of the County. Additionally, like the defendants in *Stoneking*, the County and Board of Commissioners were incontestably acting under color of state law.

Stoneking also states: "Nothing in *DeShaney* suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates." *Id.* at 725. This was twice the ruling of the trial court in the instant case, *i.e.*, Vermillion County and the Commissioners of Vermillion County may not escape liability arising from their policies maintained in deliberate indifference to actions taken by nurse Majors, their subordinate. Pet. App. 33a, ¶ 11.

Stoneking was on remand from this Court in light of *DeShaney*. The court was required to consider whether Stoneking still had a viable § 1983 claim if the defendants did not have a duty to protect her. The court held that she did still have a viable claim, because she alleged that the defendants, "with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused her constitutional harm." *Id.* at 725. Similarly, in the instant case, even if the respondents are found not to have a duty to protect the patients at Vermillion County Hospital, the petitioners still have a viable claim because they alleged that the respondents established and maintained a policy, practice or custom which directly caused constitutional harm to the decedents and their next of kin. *See* Statement of the Case, p. 7.

Even if *DeShaney* is applicable to the instant case and Majors is considered a private, third party actor, the Court of Appeals of Indiana ignored an exception to the rule stated in *DeShaney*, which has been recognized by many of the federal circuits. This exception, often referred to as the state created danger exception, applies when the state creates a dangerous situation or causes a citizen to be more vulnerable to danger. *Stevens v. Umsted*, 131 F.3d 697 (7th Cir. 1997) concluded under the facts of the *Stevens* case that the state did not create a danger that would give rise to a duty to protect. However, *Stevens* is illustrative and instructive in its interpretation of the exception to *DeShaney*:

> We have also interpreted *DeShaney* as creating a second exception to the no duty to protect individuals from actions of private actors rule. We have stated that *DeShaney* "leaves the door open for liability in situations where the state creates a dangerous situation or renders citizens more vulnerable to danger." *Reed*[15], 986 F.2d at 1125 (*citing DeShaney*, 489 U.S. at 201, 109 S. Ct. at 1006. . . .)

Stevens v. Umsted, 131 F.3d 697, 704 (7th Cir. 1997) (footnote added).

Furthermore, the limitation of *DeShaney* was explained in *Horton v. Flenory*, 889 F.2d 454 (3d Cir. 1989):

> *DeShaney* certainly stands for the harsh proposition that even though state officials know that a person is in imminent danger of harm from a third party, the fourteenth amendment imposes upon those state officials no obligation to prevent that harm. *This holding is limited, however, to*

15. *Reed v. Gardner*, 986 F.2d 1122 (7th Cir.1993), *reh'g denied, cert. denied*, 510 U.S. 947 (1993).

> *situations in which the state is not involved in the harm, either as a custodian or as an actor.*

Id. at 457 (emphasis added).

How could the Court of Appeals of Indiana hold that the County was not involved when an employee of the County hospital was murdering patients on a recurring basis, at an epidemic level, over a two year period, when the County Health Officer had the ability, means, authority, and obligation to review, report, and stop those deaths? The County was clearly involved in the harm, both as a custodian and an actor. The County created a danger to the patients and rendered the patients more vulnerable to an existing danger. In several ways, the County placed the patients of Vermillion County Hospital in a position of danger which they would not have otherwise faced in several ways.

Nurse Orville Lynn Majors was rehired as an employee of Vermillion County Hospital although that county hospital had previously terminated him with a recommendation not to rehire him. Additionally, Vermillion County and the Commissioners of Vermillion County made a conscious decision not to prevent, stop, or even to review or investigate, the epidemic increase in deaths reoccurring at, Vermillion County Hospital. The County Health Officer purposely ignored his duties to abate wrongful health conditions within his county, to review the death charts and records, to report deaths to the state department of health, and to enforce the health laws of the State of Indiana. The County Health Officer rendered the patients of Vermillion County Hospital more vulnerable to danger and was involved in the harm, both as a custodian and an actor.

B. The County Health Officer Was The Official Policymaker Rendering The County Liable Under 42 U.S.C. § 1983 And The County Is Subject To Liability For Acts Occurring At The Hospital.

The decision of the Court of Appeals of Indiana is also in conflict with *Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 283 (7th Cir. 1986) which explained that "[t]he acts of a high-ranking official of a governmental entity may render the entity liable under § 1983 where the official is a policymaker whose conduct is in effect that of the governmental entity." *Malak* also explained:

> [A] governmental entity can act only through staff, and at a sufficiently high level the acts of officials are the acts of the governmental entity. The courts, including this one, have correctly concluded that when the conduct of a policymaker causes the alleged injury, that conduct may be fairly attributed to the governmental entity.

784 F.2d at 283 (citation omitted). As demonstrated by the statutory and factual analysis above, the County Health Officer was the policymaker for Vermillion County for matters of public health, who allowed the deaths to continue, over a two year period, at the county hospital. The County Health Department is statutorily mandated, and is responsible to the Board of Commissioners. I.C. § 16-20-1-2 (2003) and I.C. § 8-22-1-7 (2003). The County Health Officer is the *executive* of that County Health Department. I.C. § 16-20-2-16(d) (2003), and is charged with the various statutory duties, discussed above,[16] to protect the public health in the County.

16. As set forth previously, the County Health Officer's duties included to take all necessary actions to protect the public health, to abate wrongful health conditions within his jurisdiction, to collect, record and report all deaths within the County, and to enforce the health laws and regulations.

Just as importantly, the Board of Health, of which the County Health Officer is the *executive officer*, is statutorily authorized by I.C. § 16-20-5-6(7) (2003) to "[a]dopt rules necessary . . . to establish administrative policies and procedures," which is certainly the policymaking function for the County for matters of public health.

The evidence submitted to the trial court demonstrated that the County defendants, contrary to these direct duties to investigate, report, review, and prevent the recurring epidemic deaths at the Vermillion County Hospital, established a policy or custom of ignoring the cause, number, and the reasons for, patient deaths. This is the kind of governmental policy making which Congress was attempting to prohibit when it enacted § 1983.

The trial court correctly concluded that there were material issues of fact, precluding summary judgment, as to whether the County Commissioners, as the county executive, and the County Health Officer, were governmental actors or policymakers for Vermillion County Hospital. Pet. App. 34a, ¶ 12. The Court of Appeals of Indiana incorrectly reversed, deciding, as a matter of law, to the contrary. However, the evidence in this case is that for matters of public health, the County Health Officer's conduct is that of the governmental entity, and is attributed to the governmental entity. *Malak* is therefore applicable, contrary to the holding of the Court of Appeals of Indiana.

The Court of Appeals decision is also in conflict with *Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194 (10th Cir. 1988). *Milo* examined the issue of due process at a municipally owned hospital. The Tenth Circuit assumed that the municipally owned hospital was acting under color of state law for purposes of *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

The issue in *Milo* was whether or not a private corporation, which had entered into an agreement to manage a municipally owned hospital, was a state actor. The court determined that the city had established a public trust to oversee the operations of the hospital. Thus, even under circumstances where the hospital had been contracted to a private corporation, there was sufficient public involvement to subject a private hospital corporation to § 1983 liability.

In the instant case, public health activity, by state statute, was controlled by, and the responsibility of, the County. The operation of the hospital was controlled by the Vermillion County Health Officer, a state actor who oversees public health policymaking functions of the County, including the County owned hospital. The County Health Officer was also in the unique position of having been the medical director of the Intensive Care Unit when the deaths were occurring, and the only member of the medical staff present at the Service of Medicine Committee meetings which was charged with the responsibility to review the death charts. As the Indiana State Board of Health concluded, the death charts were not reviewed as required.

Under both *Malak* and *Milo*, contrary to the holding of the Court of Appeals, the County Health Officer was the official policy maker of the County. As such, the County is liable under § 1983, and the County is subject to liability for the acts occurring at the hospital.

C. The Petitioners Have Asserted A Deprivation Of Constitutional Rights Necessary To Maintain A Claim Under 42 U.S.C. § 1983.

The opinion of the Court of Appeals of Indiana also conflicts with *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700 (11th Cir. 1985) in which a personal representative brought a § 1983 civil rights action against the County, its sheriff, and the entity which provided medical care to county jail inmates. Ancata and the Court of Appeals concluded that the complaint sufficiently alleged deliberate indifference to the serious medical needs of Ancata on the part of medical personnel.

The court explained that if the County established or utilized a policy or custom that required the inmates to obtain court orders for medical assistance, and that policy or custom resulted in delaying treatment, or played a role in deliberate indifference shown to the prisoner, the county may be liable. Also, if the County permitted the sheriff and/or the prison health officials that it contracted with to establish the policy or custom, it may be liable. The liability would be a result of the County's own policy.

Like *Ancata*, petitioners have alleged, at minimum, deliberate indifference to the health needs and lives of the patients at Vermillion County Hospital by the County, Commissioners, and the County Health Officer. *See* Statement of the Case, p. 6. Under *Ancata*, the Civil Rights claim is a proper cause of action.

The County Health Officer was clearly acting under color of law. He was cloaked in the authority of the County in matters of public health, and had the duty to protect the public from the epidemic level of recurring suspicious deaths at a County facility. The County Health Officer's actions and

policy making authority subject the County to § 1983 liability. The County Health Officer was the only physician who attended the Service of Medicine Committee meetings which reviewed the deaths and had the knowledge of the operation of the ICU where nurse Majors worked and the deaths occurred. The County had, and assumed, a duty to protect the public from the actions of nurse Majors, and willfully failed to do so.

Finally, the Court of Appeals of Indiana's opinion is in conflict with *Kipps v. Caillier*, 205 F.3d 203 (5th Cir. 2000), *cert. denied*, 531 U.S. 816 (2000), in that petitioners specifically alleged a deprivation of the right to familial association, among other constitutional rights. Citing the United States Supreme Court case of *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the federal court explained the right to familial association:

> In *Roberts*, the Court noted that the right to intimate association, the freedom to choose "to enter into and maintain certain intimate human relationships," is a "fundamental element of personal liberty." 468 U.S. at 617-18, 104 S. Ct. 3244. At the foundation of this right to intimate association are family relationships:
>
> > Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.
>
> . . . .

> *Roberts*, 468 U.S. at 619-20, 104 S. Ct. 3244 (emphasis added); *see also McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994) ("At a minimum, the right of intimate association encompasses the personal relationships that attend the creation and sustenance of a family.") (emphasis added). Supreme Court precedent with respect to intimate association can be synthesized as a continuum with "family relationships" at one end, receiving the most protection, and arms length relationships, like a business acquaintance, at the other end, "remote from the concerns giving rise to this constitutional protection." *Roberts*, 468 U.S. at 620, 104 S. Ct. 3244.

205 F.3d at 205.

Deprivation of the right to familial association, as well as the rights to life, liberty, and property, have been adequately asserted by Petitioners. *See* Statement of the Case, p. 7. Thus, the decision of the Court of Appeals of Indiana is in conflict with *Kipps*, *supra*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

STEPHEN L. WILLIAMS
Counsel of Record
JOHN T. ROACH
MANN LAW FIRM
646 Walnut Street
Terre Haute, IN 47807
(812) 232-0107

C. JOSEPH ANDERSON
JOHN NICHOLS
ANDERSON & NICHOLS
300 Ohio Street
Terre Haute, IN 47807
(812) 234-7777

ERIC A. FREY
FREY LAW FIRM
618 Wabash Avenue, Suite 200
Terre Haute, IN 47808
(812) 238-1811

Attorneys for Petitioners

APPENDIX A — MEMORANDUM DECISION FROM THE INDIANA COURT OF APPEALS DATED JUNE 3, 2003

IN THE COURT OF APPEALS OF INDIANA

No. 83A05-0207-CV-335

VERMILLION COUNTY, INDIANA, and BOARD OF COMMISSIONERS OF VERMILLION COUNTY, INDIANA,

Appellants-Defendants,

vs.

SUSAN VICORY, et al.,

Appellees-Plaintiffs.

APPEAL FROM THE VERMILLION CIRCUIT COURT
The Honorable Frank M. Nardi, Judge
Cause No. 83C01-9508-CT-6

June 3, 2003

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

This appeal stems from litigation involving the murders committed by Orville Lynn Majors at the Vermillion County

Appendix A

Hospital. Appellants-defendants Vermillion County, Indiana, and the Board of Commissioners of Vermillion County, Indiana, (collectively, the County defendants) appeal the trial court's denial, in part, of their motion for summary judgment. They argue that the plaintiffs have failed to assert a deprivation of right necessary to maintain a § 1983 claims and that many plaintiffs have failed to satisfy the notice provisions of the Indiana Tort Claims Act, the Wrongful Death Statute, and the statute of limitations for general negligence claims. For those plaintiffs whose claims are not time-barred, the County defendants contend that they have failed to assert a duty necessary to maintain negligence claims.

FACTS

In February 1993 the Vermillion County Hospital (Hospital) hired licensed practical nurse Orville Lynn Majors. The death rate in the ICU, where Orville Lynn Majors worked, climbed from 25 in 1992 to 31 in 1993 to 101 in 1994. While the number of deaths escalated during those years, the number of ICU admittees slightly declined. Almost all the deaths took place on Orville Lynn Majors's shift. Investigators concluded that Majors killed these patients by injecting them with potassium chloride. *See Majors v. State*, 773 N.E.2d 231, 234 (Ind. 2002). He was found guilty of murdering six Hospital patients and is currently serving a 360-year prison sentence. *Id.* at 233.

At the time, Dr. John Albrecht was responsible for general oversight of the ICU. He also served as Chairman of the Hospital's Service of Medicine Committee. One of the

committee's responsibilities was to review the charts of deceased patients. Designated evidence showed that the committee members were not reviewing the charts. Moreover, in his capacity as County Health Officer, Dr. Albrecht signed the death certificates of every deceased Vermillion County resident, including those who had been Hospital patients.

On August 10, 2000, eighty plaintiffs jointly filed their tenth amended complaint for damages to their respective decedent's[1] estates and damages for violations of their constitutional right to familial association. Their claims rest on the allegation that Majors intentionally caused the death of each decedent. The plaintiffs sued various defendants including Dr. Albrecht; the Hospital; Vermillion County, Indiana; and the Board of Commissioners of Vermillion County, Indiana. The complaint brought claims for "negligence," "gross negligence," and "violation of civil rights."

On September 22, 2000, the County defendants filed their second motion for summary judgment.[2] They argued that neither the County nor its Board of Commissioners could be

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1. Seventy-six decedents are represented by a total of eighty personal representatives in this action. Of those decedents, five are represented by two co-personal representatives each. Two decedents, Laura Malkin and Charles Malkin, are represented by the same personal representative, Viola K. Chrimes.

2. The trial court denied the County defendants' first motion for summary judgment. It granted them leave to file a second motion when it was brought to the trial court's attention that its first decision may have relied on an inapplicable Indiana statute.

held liable under § 1983. The County defendants' summary judgment motion raised other contentions, including: plaintiffs' failure to abide by the notice requirement of the Indiana Tort Claims Act (ITCA), failure to file the wrongful death actions within two years of the death of the decedents, and the County defendants' governmental immunity under the ITCA. The trial court granted the County defendants partial summary judgment. Against those plaintiffs who had failed to file any notice of claim under the ITCA, the trial court granted summary judgment on the state-law tort claims only. The County defendants now appeal the denial of the other portions of their motion for summary judgment. Those plaintiffs who failed to file any notice of claim do not challenge the grant of summary judgment to the County defendants.

DISCUSSION AND DECISION

I. § 1983 Claims

The plaintiffs brought claims under § 1983 for the deprivation of their decedents' right to life and for the plaintiffs' right to familial association with the decedents. The plaintiffs assert that the County defendants deprived their respective decedents' of the right to life guaranteed by the Due Process Clause of the Fourteenth Amendment.[3] Correspondingly, the

3. The actual text of the Fourteenth Amendment provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprives any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

US. Const. amend XIV, § 1.

plaintiffs argue that the County defendants deprived them of the "substantive" due process right to familial association with their decedents. Under § 1983, citizens may sue government officials for violations of federal rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983. Both a municipality and a municipal official sued in his official capacity are "persons" amenable to suit under § 1983 for retrospective (monetary) and prospective (injunctive) relief. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) (holding that § 1983 applies to "municipalities and other local government units"); *Brandon v. Holt*, 469 U.S. 464 (1985) (holding that § 1983 applies to a municipal official sued in his official capacity). Therefore, Vermillion County, as a local government unit, and the Board of Commissioners, as municipal officials sued in their official capacity, are "persons" amenable to suit under § 1983.

Not only must defendants be amenable to suit as § 1983 "persons," the plaintiffs must bring a proper claim. There are two basic elements of a § 1983 claim. "To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that: (1) the defendant deprived the plaintiff of a right secured by the Constitution and the laws of the United States, and (2) the defendant acted under color of state law." *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996).

Any examination of governmental liability for failure to protect a citizen from third-party criminal attacks necessarily begins with *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). In *DeShaney*, the U.S. Supreme Court described the extent of government's responsibility for protecting citizens from one another:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. . . . *Its purpose was to protect the people from the State, not to ensure that the State protected them from each other*. The Framers

> were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

489 U.S. at 195-96 (citations omitted) (emphasis added). The Court ruled: "As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197; *see also Severson v. Bd. of Trs. of Purdue Univ.*, 777 N.E.2d 1181, 1197-99 (Ind. Ct. App. 2002) (holding that university officials and law enforcement organizations did not deprive student or parents of their substantive due process rights by failing to protect student from being murdered by another student), *trans. denied.* There is no due process deprivation even when "state functionaries" stand by and do nothing "when suspicious circumstances dictated a more active role for them." *Id.* at 203.

The Seventh Circuit anticipated the *DeShaney* ruling several years earlier when the court described governmental constitutional liability for the criminal acts of third parties. The Seventh Circuit made clear that a government actor would generally not be held responsible for the criminal acts of third parties:

> There is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law. *But there is no constitutional right to be protected by the state*

> *against being murdered by criminals or madmen.* It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (emphasis added). The *Bowers* court held that the government did not put the victim in the position of danger, rather, it simply failed to adequately protect her as a member of the public. *Id.*

Here, the plaintiffs' claim of deprivation of rights rests on the County defendants' failure to protect Hospital patients from Orville Lynn Majors. The plaintiffs argue, "[T]he County's and the Commissioner's failure to investigate deaths or take proactive actions to protect the patients of Vermillion County Hospital are indeed cognizable violations of the Fourteenth Amendment." Appellees' App. p. 28. Those failures included "the County Health Officer's disregard of the increase in, and failure to investigate, the death rate at Vermillion County Hospital." Appellees' App. p. 31-32. If these allegations are taken as true, the most that can be said is that the County defendants stood by when "suspicious circumstances" would have dictated a more active role. *See DeShaney*, 489 U.S. at 1003. The County defendants, in other words, failed to protect the plaintiffs' decedents who

were at the time "member[s] of the public." *Bowers*, 686 F.2d at 618. Even when the plaintiffs' allegations and the reasonable inferences there from are taken as true, the County defendants were entitled to summary judgment as a matter of law on all the plaintiffs' § 1983 claims.

II. Time-Barred State-Law Tort Claims

According to the County defendants, not only are the federal law claims worthy of summary judgment, but so also are the state-law claims against them. The County defendants make three main arguments—based on timeliness—for the grant of summary judgment on the state-law tort claims in their favor. First, they contend many plaintiffs failed to file notice of claims under the Indiana Tort Claims Act within 180 days of their respective decedent's death. Second, they contend that another class of plaintiffs failed to file their wrongful-death actions within two years of the death of their respective decedents. Third, the County defendants argue that summary judgment should have been granted them on general negligence claims brought by plaintiffs who filed timely notices but not timely causes of action. Summary judgment should have been entered on the general negligence claims, according to the County defendants, because certain plaintiffs made no showing that they could not reasonably have known of the existence of the general negligence claims in time to file a cause of action before the running of the limitations period.

Appendix A

A. Notice of Claim Required by the ITCA

The trial court granted the County defendants' motion for summary judgment in part when it ruled against those plaintiffs who had filed no notice of claim.[4] Its ruling was limited to the state-law claims only; the trial court allowed the plaintiffs to proceed on their § 1983 claims.[5] For those

4. The trial court granted the County defendants summary judgment on all tort claims pursued by the following plaintiffs:

> "Malcolm Aukerman, Rebecca Batson, Robert Meadows, Robin Berg, Loretta Blackburn, Kathryn Bricker, Derek Maxwell II, Viola Chrimes for Laura Malkin, Tonya Cotterell, Mildred Genisio, Micheal Gilman, Roger Griffrn, Bruce Hafner; Brenda Henderson, Lorie Hickman, Evelyn Holbert, James Huxford, John Lee, James Lee, Richard Marshall, Jr.[,] Gloria McGill, Sue Mershon, Rodney Meyers, Normal Miller, Nellie Norman, Lance Pefley, Junior Pressley, Jr., Ethel Richardson, Dom Rolando, Mildred Smith, James Stilwell, David Wheeler, Scott White, Marilyn Whittington and Marilyn Wolfe."

Appellants' Br. p. 37 (alteration added) (quoting the trial court order granting in part and denying in part the County defendants' motion for summary judgment). The plaintiffs do not challenge the trial court's grant of summary judgment against those who failed to file any notice of claim.

5. Tort-claim notice requirements do not apply to § 1983 claims against governmental entities or their officers and employees. *Felder v. Casey*, 487 U.S. 131, 134 (1988). Nevertheless, even when inapplicable to federal claims, notice provisions of the ITCA will (Cont'd)

plaintiffs who undisputedly filed their notices of claim after the 180-day deadline, the trial court ruled that they had substantially complied with the ITCA. Therefore, the County defendants were denied summary judgment on the state-law tort claims asserted by those who had filed notices after the 180-day deadline.

The ITCA establishes a deadline for filing tort claims against political subdivisions:

> Except as provided in section 8 of this chapter, a claim against a political subdivision is barred unless notice is filed with:
>
> (1) the governing body of that political subdivision. . . .
>
> within one hundred eighty (180) days after the loss occurs.

Ind. Code Ann. § 34-4-16.5-7 (West Supp. 1995) (current version at Ind. Code Ann. § 34-13-38 (West 1999)). Vermillion County is a political subdivision according to the ITCA. *See* Ind. Code Ann. § 34-4-16.5-2(f)(1) (West Supp.

(Cont'd)
apply to pendent state-law tort claims made at the same time as the federal claims. *Meury v. Eagle-Union Cmty. Sch. Corp.*, 714 N.E.2d 233, 242 (Ind. Ct. App. 1999), *trans. denied.* Although the ITCA notice requirements do not apply to § 1983 claims, the plaintiff failed to allege a deprivation of right actionable under § 1983. As determined above, the trial court erred in denying the county defendants summary judgment on the § 1983 claims of all plaintiffs and their decedents. *See supra* Part I.

1995) (current version at Ind. Code Ann. § 34-6-2-110(1) (West 1999)). "'Loss' means injury to or death of a person or damage to property." Ind. Code Ann. § 34-4-16.5-2(e) (West Supp. 1995) (current version at Ind. Code Ann. § 34-6-2-75(a) (West 1999)).

If the plaintiff fails to serve a notice of a tort claim within 180 days of his loss, the suit is barred and entry of summary judgment on behalf of the defendant is appropriate. *Wright v. Elston*, 701 N.E.2d 1227, 1233 (Ind. Ct. App. 1998) (citing *Holtz v. Bd. of Com'rs of Elkhart County*, 560 N.E.2d 645, 648 (Ind. 1990) ("We hold that Holtz' allegations bring him squarely within the Tort Claims Act; thus his failure to file within 180 days notice to the Board of Commissioners of Elkhart County requires that the Board's motion for summary judgment be sustained.")), *trans. denied*. In distinguishing between the *timeliness* of the notice and the *content* of the notice, our supreme court stated:

> [A] notice is sufficient if it substantially complies with *the content requirements* of the statute. What constitutes substantial compliance, while not a question of fact but one of law, is a fact-sensitive determination. In general, a notice that is filed within the 180 day period, informs the municipality of the claimant's intent to make a claim and contains sufficient information which reasonably affords the municipality an opportunity to promptly investigate the claim satisfies the purpose of the statute and will be held to substantially comply with it. . . .

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> . . . However, where a plaintiff, *within the 180 day period, fails to file any notice of an intent to make a claim*, actual knowledge of the occurrence on the part of the city, even when coupled with an investigation of the occurrence, will not suffice to prove substantial compliance.

Collier v. Prater, 544 N.E.2d 497, 499 (Ind. 1989) (citations omitted) (emphases added).

The plaintiffs who filed their notices, after the 180-day deadline contend that they substantially complied with the ITCA. They cite two cases in support: *City of Hobart Sewage Works v. McCullough*, 656 N.E.2d 1185 (Ind. Ct. App. 1995), and *Board of Aviation Commissioners v. Hestor*, 473 N.E.2d 151 (Ind. Ct. App. 1985). Neither one stands for the proposition advanced by the plaintiffs.

In *McCullough*, the plaintiffs filed a complaint against the City of Hobart with the small claims court 120 days after discovering their property was not connected to city sewage, though they had been paying a monthly sewer assessment. 656 N.E.2d at 1189. The complaint, entitled "Notice of Claim," was served on the City. *Id.* It included the names of the parties involved, a statement of the nature of the plaintiffs' claim, the amount of damages sought, and was served on the City by the sheriff within 180 days of the plaintiffs' last monthly sewage assessment. *Id.* In *McCullough*, the dispute over the notice of claim concentrated on the form and content of the notice not its timeliness. This court held that the plaintiffs had substantially complied with the notice provisions of the ITCA within the 180-day period. *Id.*

Likewise the content of the notice—not timeliness—was the central issue in *Hestor*. The Board of Aviation Commissioners received a "mailgram" dated April 26, 1982, informing it that the plaintiff was suing for a fall she had suffered at the Michiana Regional Airport on October 29, 1981. *Hestor*, 473 N.E.2d at 152. The *Hestor* decision supports the County defendants' argument that a political subdivision must receive notice of a claim within 180 days of a loss. This court in *Hestor* remanded the cause to the trial court for fact-finding on whether the Board of Aviation Commissioners had received the mailgram within 180 days of the plaintiff's fall. *Id.* at 155 ("There are questions remaining as to when the mailgram was received by the Authority and since it was dated April 26, 1982, still within the statutory period, an inference arises that it was received within the statutory period."). In other words, although *the content* of the mailgram substantially complied with the ITCA's notice requirements, a question remained regarding whether the political subdivision received it within 180 days of the plaintiff's loss.

The plaintiffs who filed late notices argue that the County defendants "had ample notice of the suspicious nature of the deaths at the hospital and were placed on notice so that they could investigate plaintiffs' claims and prepare a defense." Appellees' Br. p. 38. To the contrary, there is no designated evidence showing that the County defendants should have assumed that the deaths could possibly be attributed to their negligence. There is no designated evidence showing that the County defendants should have assumed, within 180 days of each death taking place at the Hospital, that they would be sued for the deaths brought about by Orville Lynn Majors.

We hold that the trial court erred in denying summary judgment to the County defendants on the tort claims brought by any personal representative who failed to file a notice of claim within 180 days of his decedent's death.[6]

B. Wrongful Death Statute

The County defendants note that only eleven plaintiffs filed timely notices of claim. Appellants' Br. p. 17. Of those eleven, two plaintiffs failed to file their wrongful death claims within two years of the death of their respective decedents. The Wrongful Death Statute provides in part: "When the death of one is caused by the wrongful act or omission of another, *the action shall be commenced by the personal representative of the decedent within two (2) years. . . .*"

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6. The trial court should have granted the County defendants summary judgment on all the tort claims brought by the following plaintiffs who filed untimely notices of claim:

> Katherine Ahl, Tom Alderson, Timothy L. Areson, Jack Barclay, Veneta Benton, James Bratcher, Charles Catterson, Mildred Cook, Penny Frink, Homer M. Garrigus, Armand Gottardi, Hazel Hale, Claudia Haughee, Elizabeth L. Hiddle, Orville Hornbeck, Pearl Johnson, Lawana Kraemer, John Landsaw, Cheryl Lear and Marlene Stevenson, Mary Snyder and Rita Miller, E. Neil Merritt, Bill Pearman, John Richardson, Larry Roberts, John Rozsa, Norma Mae Siddens, Hilda Simpson, Jerry Sims, Helen Vastine, Susan Vicory, Wayne Walton, Clinton S. Webb, and Orletta Welker.

Appellants' Br. p. 17 (citing Appellants' App. p. 235-340, which contains copies of their tort claims notices).

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Ind. Code Ann. § 34-1-1-2 (West Supp. 1995) (emphasis added) (current version at Ind. Code Ann. § 34-23-1-1 (West 1999.)). The wrongful-death cause of action accrues when the injured person dies. *Holmes v. ACandS, Inc.*, 709 N.E.2d 36, 39 (Ind. Ct. App.), *aff'd on reh'g*, 711 N.E.2d 1289 (Ind. Ct. App. 1999), *trans. denied*. Because the right to bring a wrongful death action is purely statutory, having no common law antecedent, "the two year time period within which an action must be commenced is a 'condition attached to the right to sue.'" *Id.* (quoting *General Motors Corp. v. Arnett*, 418 N.E.2d 546, 548 (Ind. Ct. App. 1981)). The two-year period is a "condition precedent" to the very existence of the claim; it is not a statute of limitation. *Id.* In other words:

> "The statute, in fixing the time for commencement of the action, sets up an indispensable condition of the liability of the action that it permits. The statute constitutes an offer of an action on condition that it be commenced within the specified time, *and if the offer is not accepted in the only way in which it can be accepted, by a commencement within the specified time, the action and the right of action no longer exist*."

Bocek v. Inter-Insurance Exch. of Chicago Motor Club, 175 Ind. App. 69, 74, 369 N.E.2d 1093, 1097 (1977) (emphasis added) (quoting 22 Am. Jur. 2d § 35, at 633). For the plaintiffs here who failed to file the wrongful death action within the two years of their decedents' death, the right of action no longer exists.

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The plaintiffs contend that the discovery rule applies to all tort claims, including wrongful-death claims. They argue that they did not know of the wrongful nature of the deaths in time to file a cause of action within two years of their respective decedent's death. Nevertheless, they neglect to cite one case applying the discovery rule to wrongful-death actions. Instead, the plaintiffs cite *Ling v. Stillwell*, 732 N.E.2d 1270 (Ind. Ct. App. 2000), *trans. denied*, for the broad principle that, "within the context of the deaths at the Vermillion County Hospital, . . . the discovery rule applies to the facts of these cases." Appellees' Br. p. 40. In *Stillwell*, the Board of Trustees of Vermillion County Hospital appealed the denial of their motion of summary judgment on medical-malpractice claims brought by the son of a deceased Hospital patient. *Id.* at 1272. The central issue was whether the statute of limitations was unconstitutional as applied to the plaintiff's medical-malpractice claim, which was brought after the two-year limitations period. Relying on our supreme court's decisions in *Martin v. Richey*[7] and *Harris v. Raymond*,[8] we held that "application of the occurrence-based two-year statute of limitations would unconstitutionally deprive [the plaintiff] of a medical malpractice claim." *Stillwell*, 732 N.E.2d at 1274. Our decision was limited to medical- malpractice claims where the personal representative could not have reasonably known of the facts giving rise to the medical-malpractice claim within two years of the injury to the decedent. We did not hold, contrary to the position advanced by plaintiffs' attorneys, that the discovery rule applied to all conceivable torts committed at the Vermillion County Hospital.

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7. 711 N.E.2d 1273 (Ind 1999).

8. 715 N.E.2d 388 (Ind. 1999).

The discovery rule does not apply to wrongful-death claims. The trial court erred in denying the County defendants summary judgments on the wrongful-death claims advanced by plaintiffs who failed to file their cause of action within two years of their respective decedent's death.

C. Statute of Limitations for General Negligence Claims

On appeal, the plaintiffs as a whole contend that general negligence claims against the County defendants, in addition to their wrongful-death claims, survive application of the limitations period by virtue of the discovery rule. As noted above, two plaintiffs timely filed their tort claims notice but failed to file their causes of action within two years of their respective decedent's death. General negligence claims on behalf of decedents are subject to a two-year statute of limitations. Ind. Code Ann. § 34-1-2-2(1) (West 1983) (current version at Ind. Code Ann. § 34-11-2-4 (West 1999)). The two plaintiffs—Mary Hedden and Viola K. Chrimes on behalf of Charles Malkin—make no argument showing why they could not reasonably have known of the negligence causes of action before the limitations period had run. Therefore, they may not invoke the discovery rule to maintain general negligence claims against the County defendants.

III. No Duty Has Been Shown

Regardless of whether certain plaintiffs have preserved their causes of action and inasmuch as some plaintiffs have brought timely claims, we will address the merits of the denial of the summary judgment pertaining to negligence claims themselves. The County defendants argue that the trial court

erroneously denied them summary judgment on claims advanced by nine plaintiffs who did give timely notice under the ITCA and filed their wrongful-death actions within two years of their respective decedent's death. In this vein, the County defendants assert that they cannot be held liable through respondeat superior for acts Dr. Albrecht committed in his capacity as doctor is private practice or through their alleged negligent management and control of the Hospital. We will address each argument in turn.

A. Respondeat Superior

To maintain a negligence action, a plaintiff must show: "(1) duty owed to plaintiff by defendant, (2) breach of duty by allowing conduct to fall below the applicable standard of care, and (3) compensable injury proximately caused by defendant's breach of duty." *Bader v. Johnson*, 732 N.E.2d 1212, 1217 (Ind. 2000). A governmental entity's "duty to use ordinary and reasonable care under the circumstances" may be "derivative" through the application of respondeat superior. *Benton v. City of Oakland City*, 721 N.E.2d 224, 228 (Ind. 1999). Under respondeat superior, a governmental employer is held liable for a governmental tortious employee's "actions taken within his scope of employment." *Lake County Juvenile Court v. Swanson*, 671 N.E.2d 429, 438 (Ind. Ct. App. 19796), *trans. denied.*

Here, the plaintiffs argue that the County is liable for the alleged tortious acts of its employee Dr. Albrecht. They maintain that Dr. Albrecht knew of the suspiciously high number of deaths taking place at the Hospital because of his duties as director of the ICU and the medical service

committee. They also contend that Dr. Albrecht, as County Health Officer, signed the death certificates of those deceased patients. In their view, Dr. Albrecht should have acted on the knowledge of the suspicious circumstances as County Health Officer to investigate and then prevent further killings.

The County defendants counter that the deaths at the Hospital were not a result of the alleged tortious actions taken within the scope of Dr. Albrecht's governmental employment as County Health Officer. An examination of the County Health Officer's statutory duties and areas of authority shows that none of his alleged tortious actions (including the failure to act) were taken within the scope of his employment as County Health Officer. The following is a list of some of the County Health Officer's responsibilities and areas of authority:

- make birth or death records, along with vital statistics, and forward them to the state department (Ind. Code § 16-20-1-17 (1993));

- enforce local health laws, ordinances, rules, and regulations (Ind. Code § 16-20-1-19 (1993));

- take any action authorized by statute or rule to control communicable diseases (Ind. Code § 16-20-1-21 (1993));

- may make sanitary inspections and surveys of all public buildings and institutions (Ind. Code § 16-20-1-22(1993));

- may order measures "reasonable and necessary" for the prevention and suppression of disease (Ind. Code § 16-20-1-23 (1993));

- may forbid public gatherings when considered necessary to prevent and stop epidemics (Ind. Code § 16-20-1-24 (1.993.)); and

- order the abatement of conditions that may transmit, generate, or promote disease (Ind. Code § 16-20-1-25 (1993)).

While the County Health Officer is responsible for keeping and forwarding death records, he is not responsible for investigating a suspiciously high number of deaths to reduce a county population's mortality. Each of the other statutory areas of authority and responsibility relate to disease control and prevention—not on investigating deaths having no apparent connection to communicable diseases. Therefore, the County defendants are not liable for Dr. Albrecht's failure to investigate the suspiciously high number of deaths taking place at the Hospital.[9]

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9. Holding the county defendants liable because of Dr. Albrecht's knowledge of the suspiciously high number of deaths gleaned from his private medical practice is tantamount to making all governmental employers liable for their employees' actions or failures to act in roles outside the appointed scope of the employees' public employment. As of 2001, including public school teachers, policemen, and firemen among others, there were 324,447 state and local governmental employees out of a general population of over 6,000,000 Indiana citizens. US. Census Bureau, *2001 Public Employment Data: State and Local Governments: Indiana*, at http://www.census.gov/govs/apes/01stlin.txt (last visited May 5, 2003). Given that one out of twenty Hoosiers is a state or local governmental employee, the potential for respondent-superior liability under the

(Cont'd)

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B. Management, Control, and Operation of the Hospital

In addition to a "derivative" duty, the plaintiffs assert that the County defendants owed a "direct" duty to investigate and prevent the deaths taking place at the Hospital. *See Benton*, 721 N.E.2d at 228 (distinguishing between a governmental entity's derivative and direct duty). The plaintiffs contend that the County defendants exercised indirect and direct "control and management" of the Hospital to such an extent that the County defendants are liable for the deaths caused by Orville Lynn Majors. As for indirect "control and management," the Board of Commissioners was statutorily responsible for all appointments to the Hospital's governing board. *See* Ind. Code § 16-22-2-6 (1993) (granting the "county executive" the exclusive authority to appoint the members of the governing board of a county hospital which is established "under Acts 1917, c.144, s.1"); Ind. Code § 16-22-2-7 (1993) (allowing for limited expansion of a governing board from appointments made by the county executive). Such a governing board, in turn, "*is the supreme authority in a hospital and is responsible for the management*,

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(Cont'd)

plaintiffs' proposed rule is enormous. While the potential drain on the public fisc is great, the benefit of reducing the risk of injury is negligible. State and local government employers lack the omniscience necessary to apprehend the behavior of their employees taking place outside the government employer-government employee relationship, not to mention the omnipotence to regulate it. *See generally Palsgraf v. Long Island RR. Co.*, 162 N.E. 99, 100 (N.Y. 1928) ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.").

control, and operation of the hospital." Ind. Code § 16-22-3-1 (1993) (emphasis added). As for direct "management and control," certain rare events pertaining only to the Hospital's very existence required participation by the Board of Commissioners. If the Hospital were to cease doing business or were to transfer management to a nonprofit organization, then the Board of Commissioners would be statutorily obligated to share in such decisionmaking along with the Hospital's governing board. Ind. Code § 16-22-3-17(e) (1993) (dissolution and termination of hospital); Ind. Code § 16-22-3-18 (1993) (transfer of management to nonprofit organization).

As a matter of law, we conclude that the County defendants were not responsible for the general management and control of the Hospital. While the Board of Commissioners appointed the members of the governing board, the Board of Commissioners had no authority to govern the day-to-day operations of the Hospital. According to Indiana law, "supreme authority" for day-to-day decisionmaking rests in the Hospital's governing board, not the Board of Commissioners of Vermillion County, Indiana. *See* Ind. Code § 16-22-3-1 (1993). If the Board of Commissioners has no authority to direct the daily operations of the Hospital, it cannot be said to have a duty to manage and control the Hospital. Likewise, the authority to participate in decisions at extraordinary stages in the Hospital's existence does not confer on the Board of Commissioners the general authority to control and manage the Hospital on a day-to-day basis. To hold otherwise requires a court to contrive a philosophy of liability that bears little resemblance to the practical governance of the Hospital, let alone conformity with the law's allocation of responsibility.

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CONCLUSION

In sum, we hold that the trial court correctly granted summary judgment in favor of the County defendants on tort claims brought by plaintiffs who filed no notice of claim. The trial court, however, erred in denying the County Commissioners summary judgment on all the plaintiffs' federal- and state-law claims. First, the plaintiffs failed to assert a deprivation of their constitutional rights necessary to maintain a § 1983 claim. Second, the County defendants should have been awarded summary judgment on all tort claims brought by each plaintiff who failed to file a notice of claim within 180 days of his decedent's death. Third, the County defendants should have been awarded summary judgment on the wrongful-death claim brought by each plaintiff who failed to file his cause of action within two years of his decedent's death. Fourth, the County defendants should have been awarded summary judgment on all negligence claims brought by those plaintiffs who failed to show why the discovery rule avoided application of the statute of limitations. Finally, the County defendants should have been awarded summary judgment on all tort claims timely filed because investigating deaths was not within the scope of the County Health Officer's employment. Additionally, Dr. Albrecht's alleged failures and acts outside the scope of his public employment may not be imputed to his public employment, and the County defendants were not responsible for the day-to-day management and control of the Hospital.

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Judgment affirmed in part, reversed in part, and remanded for entry of summary judgment in favor of the County defendants on all the plaintiffs' federal- and state-law claims. SULLIVAN, J. and DARDEN, J., concur.

APPENDIX B — ORDER REGARDING MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT VERMILLION COUNTY AND THE COMMISSIONERS OF VERMILLION COUNTY DATED AND FILED MARCH 23, 2000

IN THE VERMILLION CIRCUIT COURT

CAUSE NO. 83C01-9508-CT-6

STATE OF INDIANA)
) SS:
VERMILLION COUNTY)

SUSAN VICORY, ET AL.

PLAINTIFFS

VS.

ORVILLE LYNN MAJORS, ET AL,

DEFENDANTS

ORDER REGARDING MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT VERMILLION COUNTY AND THE COMMISSIONERS OF VERMILLION COUNTY

This cause is now at issue regarding the Motion for Summary Judgment filed herein by defendant Vermillion County and the Commissioners of Vermillion County. The Court conducted and completed a hearing regarding said

Motion and took the same under advisement. The Court, being duly advised, now finds and Orders as follows:

1. There exist genuine issues of material fact which preclude the entry of summary judgment in favor of defendant Vermillion County and the Commissioners of Vermillion County.

2. The Court notes that the defendants have cited the Court to Indiana Code 16-22-2-5(b) for the proposition that the defendants are not responsible for the operation of the county hospital because the authority for the same resides in the board of trustees. This statute, however, provides that the management and control of the hospital is placed with the governing board consisting of the three county commissioners, two appointees of the county fiscal body, and two appointees of the county executive. This statute clearly places the control over the operation of the hospital in the hands of the county commissioners.

3. Additionally, the Court finds that the county health officer is administratively responsible to the county executive and that his duties are as alleged by the plaintiffs in this cause. The county health officer is cloaked with the authority of the county and as alleged by the plaintiffs, the county is liable for his actions in that capacity.

4. The defendants assert that the plaintiffs claims should be barred due to their failure to file tort claim notices under Indiana law. The plaintiffs have submitted proof that the same were filed, however, such notices are not required in Section 1983 actions such as the present action.

5. In regard to the issue of plaintiffs' claim for punitive damages, the Court finds that Indiana Code 34-1-16.5-4, prohibits an award of punitive damages against defendants, Vermillion County and the Board of Commissioners of Vermillion County.

6. The Court denies the defendants' Motion to Strike.

The Court accordingly denies the Motion for Summary Judgment, filed herein by defendants Vermillion County and the Board of Commissioners of Vermillion County in all regards, except in regard to the issue of punitive damages, in which respect the motion is granted.

ALL ORDERED THIS 23rd DAY OF MARCH, 2000.

s/ Frank M. Nardi
FRANK M. NARDI, SPECIAL JUDGE
VERMILLION CIRCUIT COURT

APPENDIX C — ORDER REGARDING SECOND MOTION FOR SUMMARY JUDGMENT FILED HEREIN BY SEPARATE DEFENDANTS VERMILLION COUNTY, INDIANA AND THE COMMISSIONERS OF VERMILLION COUNTY, INDIANA, PARTIAL SUMMARY JUDGMENT, AND NOTICE OF HEARING DATED AND FILED JANUARY 9, 2002

IN THE VERMILLION CIRCUIT COURT

CAUSE NO. 83C01-9508-CT-6

STATE OF INDIANA)
) SS:
VERMILLION COUNTY)

SUSAN VICORY, ET AL.

PLAINTIFFS

VS.

ORVILLE LYNN MAJORS, ET AL,

DEFENDANTS

ORDER REGARDING SECOND MOTION FOR SUMMARY JUDGMENT FILED HEREIN BY SEPARATE DEFENDANTS VERMILLION COUNTY, INDIANA AND THE COMMISSIONERS OF VERMILLION COUNTY, INDIANA, PARTIAL SUMMARY JUDGMENT, AND NOTICE OF HEARING

Appendix C

This cause is now at issue regarding the Second Motion for Summary Judgment filed herein by separate defendants, Vermillion County, Indiana, and the Commissioners of Vermillion County, Indiana. The Court conducted and completed a hearing on said Second Motion and took the same under advisement. The Court, being duly advised, now finds and Orders as follows:

1. This Court entered its prior ruling on the first Motion For Summary Judgment filed by these defendants on March 20, 2000.

2. After Court entered said Order, the defendants moved the Court to reconsider its ruling, which request the Court granted over the vehement objection of the plaintiffs.

3. Both parties have correctly cited the Court to the standards which the Court must apply in ruling upon a motion for summary judgment, which standards do not need to be repeated here. It is this Court's opinion that a summary judgment is a drastic measure, which terminates a cause without the opportunity to weigh the credibility of witnesses and weigh all of the evidence in a full and open adversarial setting. Summary judgment should only be used to terminate a cause of action when it is clearly established that no genuine issues of material fact exist and that one party is entitled to judgments as a matter of law. The rationale of Trial Rule 56 assumes that there exists no reason to delay in the entry of judgment so as to terminate unfounded litigation.

4. It is clear to this Court that several genuine issues of material fact exist in this case in regard to separate defendants, Vermillion County, Indiana, and the Commissioners of Vermillion County, Indiana. The Court will refer herein to these separate defendants as the "county defendants" for brevity.

5. Initially, the rationale for reconsidering the issue of summary judgment was the fact that this Court based its prior Order on an incorrect statute. In this regard, the Court assumed that the governing board of the Vermillion County Hospital was created under I.C. 16-22-2-5(b). Under this statute, the three county commissioners were automatically members of the hospital governing board and hence would have direct involvement in the operation of the county hospital.

6. The defendants have indicated to the Court that the correct statute to be applied is I.C. 16-22-2-6. Under this statute, the hospital governing board is appointed by the county executive, but does not by statute, necessarily include the three commissioners as members of the board.

7. The defendants argue to this Court that the governing board of the hospital is the supreme authority over the hospital (see I.C. 16-22-3-1) and that accordingly, the county defendants cannot be liable to the plaintiffs under either of the plaintiffs claims herein, to wit: the Section 1983 action or the civil tort claim.

8. The Court concludes that upon examination of the authorities cited by the parties as well as the statutes governing the county executive's relation to county hospital, the Court's original conclusions remain the same, specifically, the involvement of the county executive in setting policy for the operation of the hospital and/or its control over the governing board demonstrate that genuine issues of material fact exist in this case. In this regard, it is clear under I.C. 16-22-2-6 that the commissioners exclusively appoint the members of the governing board, unlike other county boards which are appointed by a number of appointing authorities. E.g. county community corrections boards, see I.C. 11-12-2-2; the community child protection team, see I.C. 31-33-3-1; and public library boards, see I.C. 20-14-2.5-4. Additionally, the county executive under I.C. 16-22-2-7 can increase and decrease the size of the board, and under I.C. 16-22-2-9 (d) can remove members from the board for not performing their duties.

9. Further, while I.C. 16-22-3-1 makes the governing board the supreme authority in the hospital, the county executive's input and approval is still required for certain decisions affecting the operation of the hospital, e.g. the disposition of real property and certain lease arrangements, I.C. 16-22-3-17 as well as the transfer of assets or management of the hospital to a nonprofit corporation or related hospital entity, I.C. 16-22-3-18. In regard to I.C. 16-22-3-18, the county executive is a necessary party to the

determination of whether hospital services could be best provided by another entity. For these reasons, the Court concludes that Indiana law does not provide for the complete abdication of all responsibility for county hospitals to the governing board as asserted by the county defendants, but makes the county executive an integral part of the operation of a county hospital.

10. The plaintiffs have argued that the county defendants are liable on plaintiffs' claims due to the involvement of the county health officer in the operation of the Vermillion County Hospital. The Court's reaffirms its original ruling in this regard. Based upon the evidence in this case, there exist genuine issues of material fact in regard to the actions and duties of the county health officer in this case as well as his role as a policy maker for the county defendants.

11. In summary, the Court's original conclusions in regard to the matter of summary judgment on the plaintiffs' Section 1983 claims remain the same. The Court agrees that *Monell v. Dept. of Social Services* 436 U.S. 658, 98 S.Ct. 2018 (1978) stands for the proposition that the county cannot be held liable for the acts of a lower-level employee on a theory of respondeat superior. However, the county can be liable for conduct officially sanctioned by municipal actors or policy-makers through direct action or custom. See *Pembaur v. City of Cincinnati* 475 U.S. 469, 106 S.Ct. 1292 (1986). Thus the actions of the county executive and the county health officer in causing the damages claimed by the plaintiffs present genuine issues in this case.

Appendix C

12. For all of these reasons, the Court again finds that genuine issues fact exist in regard to the claims made by the plaintiffs under 42 U.S.C. Section 1983 and that the county defendants are not entitled to judgment as a matter of law. The Court denies the Second Motion for Summary Judgment in regard to the plaintiffs' claims under 42 U.S.C. Section 1983.

13. The remainder of the Second Motion for Summary Judgment addresses the tort claims made by the plaintiffs. In this regard, the county defendants assert immunity under I.C. 34-13-3-3(7), which provides that a governmental entity is not liable if a loss results from:

"(7) the adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment."

14. A governmental entity is subject to liability for torts committed by their employees or agencies unless one of exceptions under the Indiana Torts Claim Acts apply. See *Mullin v. Municipal City of South Bend* (Ind. 1994), 639 N.E. 2d 278.

15. "Our Supreme Court has explained that the scope of "enforcement" extends well beyond traditional law enforcement activities, but is "limited to those activities in which a governmental entity or its employees compel the obedience of another to laws, rules or regulation, or sanction or attempt to sanction a violation thereof. *Minks v. Pina* (Ind. App. 1999), 709 N.E. 2d 379 at p. 382, citing *Mullin*, supra.

16. At issue in this case is the alleged failure of the county defendants to comply with Indiana law and administrative rules and regulations and not with the enforcement of law against third parties. The Court accordingly concludes that the county defendants are not immune under the Indiana Torts Claim Act as alleged.

17. The defendants further argue that the plaintiff's tort and wrongful death claims are barred because they were not filed within the applicable statutes of limitations. In this regard, the law is with the plaintiffs for the reasons asserted by the plaintiffs.

18. The last remaining issue raised by the Second Motion For Summary Judgment concerns the failure on the part of certain plaintiffs to file tort claims notices. In its Order of March 23, 2000, this Court erred when it found that all plaintiffs had filed such notices. As asserted by the defendants, some plaintiffs timely filed their notices, some filed their notices after the statutory deadline, while others did not file notices at all.

19. Under I.C. 34-13-3-8 a claim against a political subdivision of this State is barred unless a tort claim notice is filed with the appropriate government body within 180 days after the loss occurs.

20. The Court reaffirms its prior ruling that the plaintiffs were not required to file tort claims notices as a prerequisite to their Complaint under 42 U.S.C.

Section 1983. Such notices are not required for such an action. These notices, however, are required by Indiana law in tort actions. The plaintiffs argue that Indiana law requires substantial compliance with the notice requirements, but does not require written notice. However, all of the cases cited by the plaintiffs which supported a waiver of the written notice requirement involved direct negotiations and communications between the parties about a specific claim of loss. There has been no such proof in this case in regard to those plaintiffs who did not file tort claim notices. The Court accordingly finds that no genuine issues of material fact exist in regard to the tort claims of those plaintiffs who failed to file any written notice of their claims pursuant to statute. The county defendants are entitled to judgment on those limited claims as a matter of law.

21. Genuine issues exist in regard to whether those plaintiffs who filed their tort notices after this statutory deadline have substantially complied with the notice requirements. The evidence suggests that these plaintiffs filed their notices in a timely manner after they discovered the basis for their cause of action. Further in regard to the claim of Jerry Sims, the evidence indicates that he is now the personal representative of the estate of Joann Sims. His claim should not be barred due to failure to file a written notice because such a notice was filed on behalf of the estate of JoAnn Sims by Erma Sims. The county defendants are not entitled to judgment as a matter of law in regard to these plaintiffs.

For all of these reasons, the Court now reaffirms those portions of its Order of March 23, 2000, which are not inconsistent with this Order.

The Court for the reasons stated herein, grants the Second Motion for Summary Judgment in regard to the tort claims of those plaintiffs who did not file any notice as required by I.C. 34-13-3-8. The Court finds that no reason exists to delay entry of this judgment. The Court accordingly enters Summary Judgment in favor of Vermillion County, Indiana, and the Commissioners of Vermillion County, Indiana, and against the following plaintiffs in regard to said plaintiffs' tort claims only:

> Malcolm Aukerman, Rebecca Batson, Robert Meadows, Robin Berg, Loretta Blackburn, Kathryn Bricker, Derek Maxwell II, Viola Chrimes for Laura Malkin, Tonya Cotterell, Mildred Genisio, Michael Gilman, Roger Griffin, Bruce Hafner, Brenda Henderson, Lorie Hickman, Evelyn Holbert, James Huxford, John Lee, James Lee, Richard Marshall, Jr. Gloria McGill, Sue Mershon, Rodney Meyers, Norman Miller, Nellie Norman, Lance Pefley, Junior Pressley, Jr., Ethel Richardson, Dom Rolando, Mildred Smith, James Stilwell, David Wheeler, Scott White, Marilyn Whittington and Marilyn Wolfe.

The Court denies the county defendants' Second Motion for Summary Judgment in all other regards.

Appendix C

The Court schedules this cause for oral arguments on the defendants' Motion for Bifurcation and Separation of Trials and further pre-trial conference for April 1, 2002 at 11:00 a.m. This hearing will be held in the Owen Circuit Court.

All Ordered this 9th day of January, 2002.

s/ Frank M. Nardi
Frank M. Nardi, Special Judge
Vermillion Circuit Court

APPENDIX D — INDIANA SUPREME COURT DECISION DENYING TRANSFER OF JURISDICTION DATED SEPTEMBER 26, 2003

CLERK

SUPREME COURT, COURT OF APPEALS,
AND TAX COURT

STATE OF INDIANA

217 State House, Indianapolis, IN 46204

317-232-1930 • Fax 317-232-8365

Colleen McNenny Shere
Acting Clerk

Cause Number
83A05-0207-CV-00335
Lower Court Number:
83C019508CT6

VERMILLION COUNTY, ET AL.
-V- VICORY, SUSAN, ET AL.

You are hereby notified that the SUPREME COURT has on this day 9/26/03

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION

OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLEE'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR EXCEPT FOR DICKSON, J., WHO VOTES TO GRANT TRANSFER. MS

WITNESS my name and the seal of said Court,
this 26TH day of SEPTEMBER, 2003

s/ Colleen McNenny Shere
Acting Clerk, Supreme Court,
Court of Appeals and Tax Court

APPENDIX E — EXCERPTED FROM BRIEF OF APPELLEES, PP. 7-11, FILED IN THE INDIANA COURT OF APPEALS, FEBRUARY 5, 2003, AND CITED TO THE SUPREME COURT OF INDIANA IN THE PETITION TO TRANSFER FILED JUNE 23, 2003

* * *

III. STATEMENT OF FACTS

Vermillion County Hospital (VCH) was a 62 bed facility with 6 nursery beds and 56 acute adult/pediatric beds. There were 4 intensive care unit beds with three in an open room and one bed in isolation. (Appellees' App. p. A-167; Lamm Study, p. 4) VCH is a public facility and is regulated by the Indiana State Department of Health. (Appellees' App. p. A-276, A-278; Deposition of Dr. Franklin Swaim, pp. 54, 132)

In February, 1993, VCH rehired a licensed practical nurse, Orville Lynn Majors ("Majors"). (Appellees' App. p. 282; Majors Dep. p. 128) The personnel file of Majors at VCH demonstrates that the hospital terminated Majors on May 23, 1991 with a recommendation not to rehire him. However, VCH rehired Majors on February 1, 1993. (Appellees' App. p. A-284; Majors Dep. Ex. 4) LPN Orville Lynn Majors worked a total of 1614.4 hours in 1994. (Appellees' App. p. A-101; State v. Majors Probable Cause Affidavit p. 3) During those hours he experienced 79 codes, or one every 20.4 hours he worked. (*Id.*) In 1993, Majors worked 837.9 total hours and had 20 codes that year or one every 40.1 hours he worked. (*Id.*) Ultimately, the death rate in the ICU went from 25 in 1992 to 31 in 1993 to 101 in 1994. (*Id.* at 2).

Appendix E

At the time the death rate increased to epidemic levels, the number of patients being admitted to the ICU was decreasing in comparison to prior years. (Appellees' App. p. A-100; State v. Majors Probable Cause Affidavit, p. 2) The admissions to ICU went down from 393 in 1990 to 351 in 1994.

In the pre-Majors years of 1990, 1991 and 1992, the deaths occurring in the ICU were 29, 25, and 26, respectively. However, after Majors was rehired, the death rate increased to 101 for calendar year 1994. Dr. Lamm concluded that the death rate increased so dramatically that it constituted an epidemic by July of 1994. (Appellees' App. p. A-174; Lamm Study, p. 11) Lamm's Study also indicated that during the epidemic period the deaths were almost all during the daytime when Majors worked. (Appellees' App. p. A-174; Lamm Study, p. 11) The Lamm study, conducted by Dr. Steven Lamm, is an independent epidemiology study commissioned by the team investigating the deaths at Vermillion County Hospital. (Appellees' App. p. A-104, State v. Majors Probable Cause Affidavit, p. 6)

One of the chief admitting physicians, and a member of the Medical Services Committee (the "Committee") was supposed to review the death charts. Dr. John Franklin Swaim ("Swaim") testified he was never aware of a single suspicious death. (Appellees' App. p. A-277; Swaim Dep., p. 66) Dr. John Albrecht, the County Health Officer, was typically the only physician who attended the Service of Medicine Committee meetings. (Appellees' App. p. A-267, Albrecht Dep. p. 24.) The County Health Officer necessarily had the same facts that Dr. Lamm later reviewed, showing

that there was a mortality epidemic at Vermillion County Hospital. (Appellees' App. p. A-170; State v. Majors Probable Cause Affadivit, Lamm Study, p. 7)

In a survey of VCH conducted by the State on April 5, 1995, the State survey team found that the Committee of which County Health Officer Dr. Albrecht was the Chairman was composed of three physicians, who never reviewed patient charts at all. (Appellees' App. p. A-79; Ind. State Dept. of Health Survey Report, Notice and Order for Remedies, Ex. 3, p. 7) Rather, they directed the nursing supervisor to review the death charts and then present her findings to the Committee. (Appellees' App. p. A-89; Ind. State Dept. Health Survey Report, Ex.3, p.17)

During the time period of May 1, 1993 to December 31, 1994, reports to the governing board on inpatient deaths were not reviewed according to the bylaws, rules and regulations of VCH. During this period, inpatient deaths at the hospital nearly doubled and ICU deaths nearly quadrupled. The State survey shows that total deaths at the hospital were as follows: 1990-90; 1991-83; 1992-91; 1993-87; 1994-160. (Appellees' App. p. A-79; Ind. State Dept. Health Survey Report, Ex. 3, p. 7)

VCH supposedly had an admission assessment policy which required a registered nurse to assess the patient within five minutes of arrival in the ICU. Of the twenty-three closed patient records reviewed by the State surveyors, none of the twenty-three had admission assessments provided by an RN and all twenty-three had admission assessments done by an LPN such as Majors. (Appellees' App. p. A-92, A-95;

Ind. State Dept. Health Survey Report, Notice and Order for Remedies, Ex. 3, pp. 20, 23) Further, the surveyors found that nursing staff failed to comply with drug storage and control requirements of State law. (Appellees' App. p. A-95; Ind. State Dept. Health Survey Report, Notice and Order for Remedies, Ex. 3, p. 23)

The surveyors found, in an interview with the administrator, John Ling, Jr., on April 5, 1995, that Ling had a "gut feeling" in November, 1994 that something was wrong in the ICU unit regarding code blue calls and unexpected deaths of patients. Although he heard an increase in code blue calls himself during that month, and admitted that this indicated the number was increasing, especially in the ICU, he did nothing. He did not contact the State Department of Health or even address the issue with the State survey team who visited VCH in December, 1994. There is no indication he ever reported the matter to the governing board, or even the Committee, which was supposed to be studying the death charts already, but was clearly not doing so. (Appellees' App. p. A-73; Ind. State Dept. Health Survey Report, Notice and Order for Remedies, Ex. 3, p. 1)

The County Health Officer, Dr. John Albrecht, was intimately involved in the day to day operations of Vermillion County Hospital. He leased office space from the hospital for about ten years after first coming to Clinton. (Appellants' App. pp. 159-160, 161; Albrecht Dep. pp. 5-6, 11-12) He has been on the hospital staff the entire time he has been Vermillion County Health Officer; staff since 1984, Vermillion County Health Officer since 1988. (Appellants' App. pp. 162, 163; Albrecht Dep. pp. 15,18) He has served

as Chief of the Medical Staff and has chaired the Medical Executive Committee, the Service of Medicine Committee, and the Pharmacy and Therapeutics Committee, and has been on the Utilization Review Committee and Records Committee. (Appellants' App. pp. 162-166; Albrecht Dep. pp. 17-32) No one ever told him to forget as County Health Officer what he learned on any of the committees. (Appellants' App. p. 165; Albrecht Dep. pp. 28-29) His role as County Health Officer included giving attention to any epidemic death rate due to communicable disease. (Appellants' App. p. 163; Albrecht Dep. p. 19)

* * * *

(2)

No. 03-870

Supreme Court, U.S.
FILED
FEB 17 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SUSAN VICORY, et al.,

Petitioners,

v.

VERMILLION COUNTY, INDIANA and BOARD OF COMMISSIONERS OF VERMILLION COUNTY, INDIANA,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Indiana, First District

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SHANNON L. ROBINSON 15253-82
Counsel of Record
DARLA S. BROWN
WILLIAM H. KELLEY
KELLEY, BELCHER & BROWN
301 West Seventh Street
Post Office Box 3250
Bloomington, Indiana 47402-3250
Telephone: 812-336-9963

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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OPINION BELOW

On June 3, 2003, the Memorandum Decision-not for publication of the Indiana Court of Appeals affirmed in part, reversed in part, and remanded for entry of summary judgment in favor of the County Defendants, by Judge Baker with Sullivan J. and Darwin J., concurring; it is reproduced in the Appendix of the Petitioner. Pt. App. 1a-25a. On September 26, 2003, the Indiana Supreme Court, the state court of last resort, denied discretionary review. Its order is reproduced in the Appendix of the Petitioner. Pet. App. 39a-40a.

JURISDICTION

The Indiana Court of Appeals entered its Memorandum Decision on June 3, 2003.

Plaintiff/Appellee's Petition for Transfer was denied by the Indiana Supreme Court on September 26, 2003. This court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitutions and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper

> proceedings for redress, except that any action brought against a judicial officer upon act or omission taken in such officer's judicial capacity injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioners are the personal representative or next of kin of persons who allegedly died while patients of the Vermillion County Hospital, Vermillion County Indiana. (Complaint ¶1, Appellants' Appendix pp. 341-343.) Respondents are the Board of Commissioners of Vermillion County, the county where the hospital is located. Plaintiffs claim that a nurse at the hospital murdered the decedents while the latter were patients. (Complaint ¶2, Appellants' Appendix, p. 343.)

The hospital was created pursuant to the Act of 1917. Pursuant to the statute, its management and operation is controlled by the Board of Trustees of Vermillion County Hospital, which is the "supreme authority" for the hospital. (Affidavit of Phyllis Orman, Exhibit "A", Appellants' Appendix, pp. 226-277.) During the relevant time period, Dr. John Albrecht was on the staff of the hospital and was in charge of the intensive care unit. (Plaintiffs' Complaint, ¶2, Appellants' Appendix, p. 343.) During that relevant time period, Dr. Albrecht also held the position of County Health Officer for Vermillion County, Indiana. (Plaintiffs'

Complaint ¶2, Appellants' Appendix, p. 343.) The responsibilities and duties of a County Health Officer are delineated by Indiana statute, I.C. 16-20-1 et seq.

Pursuant to Supreme Court Rule 15, the Respondent would point out to this Court that the Petitioners on page 3 of their Statement of the Case, state "there is no comparable occurrence of epidemic hospital death in American history." The Petitioners cite to footnote 1 referencing a *Washington Times* article of December 7, 1998. This material was neither designated nor submitted to either the trial court or the Court of Appeals below, and thus is an inappropriate and improper reference in their Petition.

Further, pursuant to Supreme Court Rule 15, the Respondent would point out that the Petitioners continually attempt to characterize the duties of the County Health Officer as including the duty or responsibility to review death charts and records in their drumbeat repetition of the statutory duties of the County Health Officer in footnote 4, footnote 5 and on pages 3 and 12, respectively. A careful reading of the statutes in question reveals that no such duty or responsibility is imposed upon the County Health Officer. Each of the statutory duties relate to disease control and prevention – not on investigating deaths having no apparent connection to communicable diseases.

B. Prior Proceedings

The Respondents agree with the Petitioners' rendition of prior proceedings and disposition of courts below, contained at pages 5-10 of their Petition.

REASONS FOR DENYING THE WRIT

The Petition for Writ herein should be denied because the decision of the Indiana Court of Appeals is not inconsistent with the decisions of this Court. Supreme Court Rule 10 provides for the considerations governing review on certiorari. Rule 10 states that a Petition will only be granted for a compelling reason and indicates the character or nature of the reasons this Court will consider, stating in pertinent part:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of the judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

In the case at bar, the Petitioners must bring their writ under subsection (c) of Rule 10, as they are seeking review of a judgment of a lower state court, and one on which the state court of last resort, the Indiana Supreme Court, has denied discretionary review. The Petition for Writ should be denied because the Court of Appeals' decision herein is consistent with relevant decisions of this Court and the lower court correctly and properly stated the rule of law.

I. THE OPINION OF THE INDIANA COURT OF APPEALS HEREIN IS CONSISTENT WITH THE RELEVANT DECISIONS OF THIS COURT AND PROPERLY STATES THE APPROPRIATE RULE OF LAW.

The Petitioners began their argument by alleging that the Indiana Court of Appeals erred in applying this Court's decision in *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) to the facts in the case at bar, instead of applying this Court's holding in the case *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

Petitioners initially and improperly cite this Court to paragraph 16 of the trial court's ruling denying the second Motion for Summary Judgment as a proper characterization of their federal claims in the case at bar. Paragraph 16 of the trial court's Order denying the second Motion for Summary Judgment is contained in the Petitioner's Appendix at page 35a. Petitioners reference paragraph 16

of the trial court's Order for the proposition that *Pembaur* and not *DeShaney* apply to the facts of this case. In paragraph 16 the trial court stated:

> At issue in this case is the alleged failure of the county defendants to comply with Indiana law and administrative rules and regulations and not with the enforcement of law against third parties.

Petitioners' reliance on paragraph 16 and their citation of this Court to that paragraph is without foundation or merit as the trial court's reference in paragraph 16 is to tort claims and to the Defendants/Respondents immunity status under the Indiana Tort Claim Act and not in reference to the Petitioners' claim of civil rights violations to which the Indiana Tort Claim Act would not even apply. Further, the trial court's finding is not precedent for either the Indiana Court of Appeals or this Court.

Petitioners contend that the County and the County Health Officer herein owed an affirmative duty to the Petitioners to protect their constitutional rights from violations by Majors, the nurse at the hospital. The Indiana Court of Appeals found that the County and The County Health Officer owed no duties to the Petitioners to protect their constitutional rights, as neither the County nor the County Health Officer were responsible for the general management or control of the hospital. Absent authority to act, there can be no duty.

Vermillion County Hospital was created pursuant to the Act of 1917, and thus its governing board was created pursuant to I.C. 16-22-2-6 and 16-22-2-7. The governing board of the hospital "is the *supreme authority in the hospital and is responsible for the management, control,*

and operation of the hospital." I.C. 16-22-3-1(a) (West 1997) (emphasis added). Furthermore, Indiana statutory law provides that the hospital board "may appoint and specify the privileges of the medical staff" and provides that the "medical staff is responsible to the board for the clinical and scientific work of the hospital and should advise the board of professional problems and policies." Indiana Code Annotated 16-22-3-1(d) (West 1997). The Indiana Court of Appeals found these two statutory provisions to be persuasive that the County Commissioners had no authority to direct daily operations at the hospital and thus no duty to manage or control the hospital.

The Court of Appeals rejected the trial court's findings that the County owed a duty to the Petitioners simply because the County: 1) had the authority to appoint the members of the governing board of the County hospital, pursuant to I.C. 16-22-2-6 (1993); and 2) had the authority to make a limited expansion of the governing board of the hospital pursuant to I.C. 16-22-2-7 (1993). The Court of Appeals also rejected any holding by the trial court that the County owed a duty to the Plaintiffs herein based upon Indiana statutes which provide that during certain rare events the County's participation in hospital matters is required, such as if the hospital were to cease doing business or cease to exist (I.C. 26-22-13-17(e) (1993)), or if the hospital would transfer the management to a non-profit organization. I.C. 16-22-3-18 (1993).

The Petitioners assert that " . . . without authority, the Court of Appeals of Indiana negated the statutory duties of the County Defendants cited by the trial court. . . ." Both courts were interpreting Indiana statutory codes. The determination of whether a governmental entity has final policy making authority is a question of state law. See *City*

of St. Louis v. Praprotnik, 485 U.S. 112 at 124-125, 108 S.Ct. 915, at 924-925. In the case at bar, the Indiana Court of Appeals reviewed the statutes and decided that the County Commissioners and the County Health Officer did not have final policy making authority over the hospital or its employee, thus deciding this issue as a matter of state law. The Indiana Supreme Court, the court of last resort, with discretionary review, has declined to grant transfer in this matter. Thus, any claims the Petitioners may have under § 1983 relating to policies and customs of the hospital are properly addressed to the hospital and its governing board and do not lie against the County or its health officer. In other words, governmental entities are only liable or responsible for its own policies, not those of another entity. See *Praprotnik*, *ibid.*, 485 U.S. 112 at 123, 108 S.Ct. 915 at 924; *Ross v. United States,* 910 F.2d 1422, 1428-1429 (7th Cir. 1990).

The duties and responsibilities of the County Health Officer are established pursuant to statute. The statutes setting forth the duties and responsibilities of the County Health Officer can be found in Title 16, Article 20, Chapter 1, of the Indiana Code:

> **16-20-1-1 Application; limited area**
>
> Sec. 1. (a) Powers and duties described in this chapter and I.C. 16-20-8 apply to all local health officers and local health boards. However, this article does not apply to a county that is subject to I.C. 16-22-8.
>
> (b) The powers and jurisdiction of a local health officer or local board are limited to the area in which the officer or board serves.

16-20-1-9 Duties of officers and employees

Sec. 9. The board of each local health department shall prescribe the duties of all officers and employees.

16-20-1-10 Records; minutes

Sec. 10. The local health officer shall keep full and permanent records of the public health work of the local health department and minutes of all meetings of the board of the local health department.

16-20-1-11 Monthly reports; approval; permanent records

Sec. 11. The local health officer shall make a monthly report of the work done by the local health department to the board of the local health department. After the report is approved by the board, the local health officer shall make the report a permanent record.

16-20-1-13 Local health officer or representative; consultative meetings with state department; expenses

Sec. 13. (a) The local health officer or a representative of all county or city boards of health shall attend meetings of the state department, when requested by the state department, for consultation concerning any matter concerning public health.

(b) The expenses of the local health officer or representative must be paid out of the health fund of the county or the city where the board of health is established, in an amount determined by the local board of health.

16-20-1-14 Personnel; delegation of duties on agent-principal relationship; requirements

Sec. 14. (a) Local health officer may appoint and employ public health nurses, environmental health specialists, computer programmers, clerks, other personnel, and an administrator of public health, subject to the confirmation of the local board of health, as is necessary and reasonable to carry out and perform the duties of the local health department.

(b) The employees of local health departments shall perform any of the duties of the health officer delegated by the health officer, with the approval of the local board of health, on the basis of an agent-principal relation.

(c) The public health personnel of local health departments:

(1) must meet the minimum qualification requirements of the local board of health;

(2) by local ordinance, become part of the county classification system for the respective public health personnel positions; and

(3) shall perform additional duties prescribed by the rules of the state department and local board of health under the general supervision of the local health officer.

16-20-1-17 Vital statistics; birth and death records

Sec. 17. (a) The local health officer shall collect, record, and report to the state department the vital statistics for the local health officer's area of jurisdiction.

(b) The local health officer shall be the registrar of births and deaths. After making a birth or death record, the local health officer shall, by the fourth day of each month, forward the original record to the state department.

16-20-1-19 Enforcement

Sec. 19. Local health officers shall enforce the health laws, ordinances, orders, rules, and regulations of the officer's own and superior boards of health.

16-20-1-21 Communicable disease control; powers

Sec. 21. Each local health board has the responsibility and authority to take any action authorized by statute or rule of the state department to control communicable diseases. The board of each local health department or a designated representative may make sanitary and health inspections to carry out this chapter and I.C. 16-20-8.

16-20-1-22 Sanitary inspections and surveys of public buildings and institutions

Sec. 22. Local health officers may make sanitary inspections and surveys of all public buildings and institutions.

16-20-1-23 Inspection of private property; property in which officer has interest

Sec. 23. (a) Except as provided in subsection (b), the local health officer or the officer's designee may enter upon and inspect private property, at proper times after due notice, in regard to the possible presence, source, and cause of disease. The local health officer or designee may order

what is reasonable and necessary for prevention and suppression of disease and in all reasonable and necessary ways protect the public health.

(b) However, a local health officer, or a person acting under the local health officer, shall not inspect property in which the local health officer has any interest, whether real, equitable, or otherwise. Any such inspection or any attempt to make such inspection is grounds for removal as provided for in this article.

(c) This section does not prevent inspection of premises in which a local health officer has an interest if the premises cannot otherwise be inspected. If the premises cannot otherwise be inspected, the county health officer shall inspect the premises personally.

16-20-1-24 Epidemic controls; powers

Sec. 24. (a) Local health officers may order schools and churches closed and forbid public gatherings when considered necessary to prevent and stop epidemics.

(b) An individual who takes action under this section shall comply with state laws and rules.

16-20-1-25 Unlawful conditions; abatement order; enforcement

Sec. 25. (a) A person shall not institute, permit, or maintain any conditions that may transmit, generate, or promote disease.

(b) A health officer, upon hearing of the existence of such unlawful conditions within the officer's jurisdiction, shall order the abatement of those conditions. The order must:

(1) be in writing if demanded;

(2) specify the conditions that may transmit disease; and

(3) name the shortest reasonable time for abatement.

(c) If a person refuses or neglects to obey an order issued under this section, the attorney representing the county of the health jurisdiction where the offense occurs shall, upon receiving the information from the health officer, institute proceedings in the courts for enforcement. An order may be enforced by injunction. If the action concerning public health is a criminal offense, a law enforcement authority with jurisdiction over the place where the offense occurred shall be notified.

16-20-1-26 Injunctive enforcement; legal representation of health authorities

Sec. 26. (a) A local board of health or local health officer may enforce the board's or officer's orders by an action in the circuit or superior court. In the action, the court may enforce the order by injunction.

(b) The county attorney in which a local board of health or local health officer has jurisdiction shall represent the local health board and local health officer in the action unless the county executive employs other legal counsel or the matter has been referred through law enforcement authorities to the prosecuting attorney.

16-20-1-28 Removal of local health officers; grounds; hearing rights

Sec. 28. (a) A local health officer may be removed only for failure to:

(1) perform the officer's statutory duties; or

(2) enforce the rules of the state department.

(b) Except as provided in I.C. 16-19-3-12, I.C. 16-19-3-13, and I.C. 16-19-3-15, a local health officer may be removed only by the board that appointed the health officer.

(c) When removal of a local health officer is sought by the appointing authority, the local health officer is entitled to the following:

(1) At least five (5) days notice.

(2) An open hearing.

(3) Representation by counsel.

I.C. 16-20-1 (West 1997).

The Court of Appeals reviewed the relevant statutes and found, as a matter of state law, that the County Health Officer is not responsible for investigating the deaths of the Petitioners' decedents.

Each of the statutory areas of authority, duties and responsibilities of the County Health Officer relates to disease control and prevention, not to investigating deaths having no apparent connection to communicable diseases. The Court of Appeals further found in footnote 9 of their opinion contained at page 20a of the Petitioners' Appendix that Dr. Albrecht's alleged knowledge of the deaths gleaned from his private medical practice cannot be

attributed to him in his role as County Health Officer. The Court of Appeals made this ruling, in part, based upon public policy. In his role as County Health Officer, Dr. Albrecht owed no duty to the Plaintiffs to investigate the high number of deaths taking place at the hospital.

The Petitioners argue that the Court of Appeals erred in that its decision is in conflict with this Court's decision in the case of *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). It is not. In the case of *Pembaur*, this court stated at pages 481-482:

> Having said this much, we hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official – even a policymaking official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. (Citations omitted.) *The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law.* (emphasis added)

The Indiana Court of Appeals found that a County Health Officer does not have official policymaking authority over a hospital created pursuant to the Acts of 1917 or over deaths unrelated to communicable diseases. Thus, the

County Health Officer does not possess the authority "respecting such activity" that could make the County herein liable. The Court of Appeals has decided this question, as a matter of state law, and the state court of last resort, the Indiana Supreme Court, has waived discretionary review in this matter.

It is inherent that government entities can be held liable under § 1983 *only* for acts which the entity itself is actually responsible, that is those acts which it has officially sanctioned or ordered. *City of St. Louis v. Praprotnik,* 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988), citing *Pembaur*. Also see, *Ross v. United States,* 910 F.2d 1422, 1428-1429 (7th Cir. 1990). In the case at bar, the County and the County Health Officer had no final policymaking authority over the entity or the individuals that allegedly violated the Petitioners' rights herein. Further, and perhaps more significantly, the Petitioners have failed even to articulate any such policy or custom of the County or the County Health Officer that is directly or casually linked to the alleged deprivations of civil rights. Thus, the Indiana Court of Appeals decision in this case does not in any way conflict with this Court's decision in the case of *Pembaur v. City of Cincinnati.*

Further, the Petitioners' argument that the *DeShaney* case is inapplicable to the case at bar is also without merit. The *DeShaney* case, of course, holds that a governmental entity's failure to protect an individual against private violence does not constitute a violation of the due process clause. The Plaintiffs argue that *DeShaney* is inapplicable to the case at bar because the alleged murders at the hospital were committed by an employee of the Vermillion County Hospital and because Dr. Albrecht was an employee of the County, as the County Health Officer.

Both of these arguments simply miss the mark. Majors was not an employee of the County. He was an employee of the Vermillion County Hospital. As previously noted, the board of trustees of the Vermillion County Hospital had full discretion, authority, and responsibility, for the operation of the hospital and for the staff. As to Dr. Albrecht, he simply did not cause the alleged violations of Petitioners' constitutional rights, either directly, or indirectly by his actions or inactions herein.

Petitioners herein attempted to distinguish *DeShaney* on the grounds that it involves "single acts of violence in a private setting" and on the grounds that the Petitioners were "placed" in danger by the Respondents herein. These arguments fail.

DeShaney does not involve a singular act of violence, but ongoing child abuse, with consistent reports to the county entity, from 1982 to 1984, resulting in "hemorrhages caused by traumatic injuries to the head inflected over a long period of time." See *DeShaney* at 193, S.Ct. 1002. The number of incidents or duration of the incidents are irrelevant to a question of whether a government entity has a duty to protect one's constitutional rights. It is simply not a determinative factor.

Petitioners next argue that *DeShaney* is distinguishable on the grounds that they were allegedly "placed" in danger. How did the County and the County Health officer place the Petitioners herein in danger? Liability for the "placement" of an individual in danger is basically limited to those situations where the individual's freedom is so restricted that the government has a duty therefore to protect their constitutional rights. See *Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982)

(case of involuntary committed mental patients); *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (duty to protect prisoners' constitutional rights.) In these cases, the duty to protect the constitutional rights arise from the limitation that the state has imposed upon the individual's freedom to act on his own behalf. In the case at bar the Respondents did not place any restrictions upon the Petitioners' freedom to act. They could have checked into the Vermillion County Hospital, or any other hospital of their choosing. They could have checked out of the Vermillion County Hospital at any point in time. The Petitioners were not "placed" in the Vermillion County Hospital by the Respondents herein. For further authorities see *Stevens v. Umsted,* 131 F.3d 697 (7th Cir. 1997) (voluntary placement of child in state run school for disabled individuals is not sufficient to create affirmative duty to protect constitutional rights) and *J.O. v. Alton Community Unit School District,* 909 F.2d 267 (7th Cir. 1990) (compulsory attendance laws requiring child to attend school is insufficient to create affirmative duty to protect constitutional rights).

Finally, the Petitioners argue that the Court of Appeals opinion is contrary to this Court's opinion in the case of *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). This argument is also without merit. As previously discussed, neither of the Respondents herein, the County nor the County Health Officer were the entity in charge of policies or customs that affected the Petitioners' constitutional rights. The Petitioners go to great lengths to attempt to establish that the County somehow has control over the Vermillion County Hospital, or its board, or Nurse Majors himself. Petitioners also go to great lengths to try and convince this

Court that the County Health Officer was somehow a policymaker over the Vermillion County Hospital, its board, or Nurse Majors himself. The Court of Appeals found that in the case at bar neither the County nor the County Health Officer were policymakers in reference to the Vermillion County Hospital or the actions of the hospital's employees. Neither the County nor the County Health Officer had a duty to protect the Petitioners' constitutional rights in the case at bar.

II. PETITIONERS ARE NOT ENTITLED TO A WRIT OF CERTIORARI BASED ON OPINIONS FROM THE UNITED STATES COURTS OF APPEALS NOR DOES THE DECISION OF THE INDIANA COURT OF APPEALS HEREIN IN ANY WAY CONFLICT WITH THE DECISIONS OF ANY OF THE UNITED STATES COURTS OF APPEALS.

Petitioners next make the argument that the decision of the Indiana Court of Appeals herein conflicts with decisions of the United States Courts of Appeals. First of all, such an argument is not an appropriate consideration under Supreme Court Rule 10. Further, even if one considered that there are inconsistent opinions existing out there, as Supreme Court Rule 10 provides, a petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Petitioners first assert that the case at bar is in conflict with that of *Stoneking v. Bradford Area School District,* 822 F.2d 720 (3rd Cir. 1989). It is not. In the *Stoneking* decision, the alleged perpetrator of the constitutional violations was in fact an employee of the entity being sued. While respondeat superior liability could not

apply in the § 1983 claim, the school was alleged to have had actual knowledge of the ongoing violations and was alleged to have taken no actions. The court therein stated at page 724:

> Unlike DeShaney's father, who was referred to throughout the *DeShaney* opinion as a private third party, Wright was a school district employee *subject to defendants' immediate control.* In fact, many of Wright's interactions with Stoneking occurred in the course of his performance of his official responsibilities, such as during school-sponsored events and trips, and sometimes on school property.

The facts of *Stoneking* are inopposite to the facts in the case at bar. In the case at bar, Nurse Majors was not an employee of the County. This would be like the plaintiff in the *Stoneking* case suing Bradford County, rather than the Bradford Area School District. Further, it is distinguishable on the grounds that there are no allegations that the County or the County Health Officer had actual knowledge of Majors' alleged violation of the Petitioners' constitutional rights herein. Contrary to Petitioners' assertion, the *Stoneking* case is simply inapplicable to the case at bar.

Plaintiffs next assert that an exception to the *DeShaney* opinion of "state created danger" is applicable in this case, citing the Court to *Stevens v. Umsted*, 131 F.3d 697 (7th Cir. 1997). The "state created danger" exception to *DeShaney* is not applicable to this case either. In the *Stevens v. Umsted* case, the Court stated at page 705:

> In order to maintain a theory under the state created danger exception, a plaintiff must plead facts showing some *affirmative act* on the part of

> the state that either created a danger to the plaintiff or rendered him more vulnerable to an existing danger. In order for the state created danger theory to be available, the 'state [must] *affirmatively* place [] a particular individual in a position of danger the individual would not otherwise have faced.'

As previously outlined above, neither the County nor the County Health Officer "placed" the Petitioners' decedents in danger. Nor did they take any "affirmative act" that created the danger or rendered the Petitioners' decedents herein more vulnerable to an existing danger. All of the Petitioners' allegations against the Respondents speak of "failures to investigate", and failure to act. In the *Stevens* case, the Court ultimately held at page 705:

> [i]n action by the state in the face of a known danger is not enough to trigger the obligation [to protect private citizens from each other] *Reed* 986 F.2d at 1125. Stevens's complaint is phrased entirely in terms of Umsted's failure to act, and thus, does not allege an affirmative act by the state. Just as in *DeShaney*, '[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.' (Citations omitted).

Thus, the *Stevens v. Umsted* case, rather than conflicting with the case at bar, is in fact consistent with the ruling of the Court of Appeals in this matter.

The case of *Horton v. Flenory,* 889 F.2d 454 (3rd Cir. 1989) is distinguishable on its face. In that case, the Court found that a governmental entity had an official policy of deferring to private individuals a governmental function. The Court therein found that the governmental entity

could be liable for constitutional violations that may have occurred during the execution of the governmental function. That is simply not the situation in the case at bar. The Petitioners herein are attempting to blur the line between the Vermillion County Hospital, its board, the Vermillion County Commissioners and the County Health Officer.

Further, neither *Milo v. Cushing Municipal Hospital*, 861 F.2d 1194 (10th Cir. 1988) nor *Malak v. Associated Physicians, Inc.*, 784 F.2d 277 (7th Cir. 1986) are applicable to the case at bar. Both those cases involve the actions by a private person or a private entity which might constitute actions of the state under the color of state law, i.e., when the state contracts with a private entity to fulfill a governmental function. This is not a case where the County or the County Health Officer has attempted to insulate themselves from liability by transferring policy-making authority to some type of private entity. See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988) (*Praprotnik* opinion) at 127; and at 926.

Finally, Petitioners begin to digress into arguments regarding assertions of the various constitutional rights that were violated. In response, the Respondents would simply cite the Petitioners in this Court to the Seventh Circuit in the case of *J.O. v. Alton*, at page 273 wherein the Court stated:

> What the plaintiffs need to show is not an expansive list of liberties allegedly taken from them but some action by the defendants that would justify the imposition of liability. The plaintiffs have failed to make this showing no matter how

> their rights are characterized, and for this reason their claims must fail.

This language is applicable to the case at bar, no matter how Petitioners frame their alleged constitutional rights – as life, liberty or family association – they cannot show any action on the part of the Respondents herein that would justify the imposition of liability in this case. Therefore, the Court of Appeals was correct in its ruling in this matter. Said ruling is consistent with the opinions of this Court and, therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SHANNON L. ROBINSON 15253-82
Counsel of Record
DARLA S. BROWN
WILLIAM H. KELLEY
KELLEY, BELCHER & BROWN
301 West Seventh Street
Post Office Box 3250
Bloomington, Indiana 47402-3250
Telephone: 812-336-9963

Attorneys for Respondents